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Sup. Ct.

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945 46

No. 864 146

RICHFIELD OIL CORPORATION, APPELLANT,

vs.

STATE BOARD OF EQUALIZATION

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

FILED FEBRUARY 18, 1946.

SUPREME COURT OF THE UNITED STATES

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SACRAMENTO

No. 65798. Dept. 2

RICHFIELD OIL CORPORATION, a Corporation, Plaintiff,

vs.

STATE BOARD OF EQUALIZATION, Defendant.

COMPLAINT FOR RECOVERY OF SALES TAX ILLEGALLY COLLECTED —Filed December 14, 1942

Comes now the Plaintiff and for cause of action against the Defendant alleges:

I

That Plaintiff is a corporation duly organized under and by virtue of the laws of the State of Delaware and is authorized to do business in the State of California.

II

That the Defendant, State Board of Equalization, is the administrative body or agency of the State of California designated in Section 31 of the California Retail Sales Tax Act, as amended, as the party against which an action shall be brought for refund of taxes collected under such Act.

III

That on March 12, 1937, Richfield Oil Company of California, a Delaware corporation, and William C. McDuffie, as Reorganization Trustee of Richfield Oil Company of California, assigned, transferred and set over unto the Plaintiff herein all properties, property rights and assets of every nature and description owned by Richfield Oil Com- [fol. 5] pany of California, a Delaware corporation, and by the said William C. McDuffie in his capacity as Reorganization Trustee of Richfield Oil Company of California. That said transfer was made in pursuance of an

Order Confirming Plan of Reorganization of Richfield Oil Company of California made and entered on December 23, 1936, by the United States District Court for the Southern District of California, Central Division, in Proceedings pursuant to Section 77B of the National Bankruptcy Act entitled "Richfield Oil Company of California, a corporation, Debtor; Pan American Petroleum Company, a corporation, Subsidiary; In Proceedings for the Reorganization of a Corporation, No. 28700-J." That in pursuance of said Plan of Reorganization, Plaintiff Richfield Oil Corporation assumed the duties, liabilities and obligations of William C. McDuffie as Receiver of Richfield Oil Company of California and of William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California.

IV

That at all times herein mentioned William C. McDuffie, as Receiver of Richfield Oil Company of California, and William C. McDuffie, as Reorganization Trustee of Richfield Oil Company of California and Plaintiff Richfield Oil Corporation have held valid and existing retailers' permits issued by the State Board of Equalization in pursuance of the provisions of the Retail Sales Tax Act of 1933, as amended.

[fol. 6]

V

That Notice of Assessment dated September 25, 1940 was issued by the State Board of Equalization and directed to Richfield Oil Corporation, which said notice stated an additional assessment in the total sum of Three Hundred Fifty-four Thousand Ninety-six and 73/100 Dollars ($354,096.73) for the taxable period April 1, 1937 to March 31, 1940, which sum included interest to October 15, 1940. That thereafter and on or about October 22, 1940, Plaintiff filed with the State Board of Equalization a Petition for Reassessment, Issue I of which protested against the action of the State Board of Equalization in including in the measure of the additional tax assessment an amount of Thirty-eight Thousand Eight Hundred Forty and 70/100 Dollars ($38,840.70) representing the "gross receipts" of an export sale to New Zealand, a Dominion of the British Empire, of petroleum products during the taxable period April 1, 1937 to June 30, 1937. That the additional tax

assessed thereon at the rate of three per cent (3%) amounted to One Thousand One Hundred Sixty-five and 22/100 Dollars ($1,165.22). That on or about May 7, 1942 the State Board of Equalization reassessed against Plaintiff the additional tax of One Thousand One Hundred Sixty-five and 22/100 Dollars ($1,165.22) and interest thereon to July 15, 1942 in the amount of Three Hundred Forty-nine and 56/100 Dollars ($349.56), a total of One Thousand Five Hundred Fourteen and 78/100 Dollars ($1,514.78), based on a measure of tax of Thirty-eight Thousand Eight Hundred Forty and 70/100 Dollars ($38,840.70) represent-
[fol. 7] ing sales of fuel oil to the New Zealand Government Stores Control Board on behalf of the New Zealand Division of the Royal Navy; and by Notice of Reassessment dated July 1, 1942 the said State Board of Equalization notified Plaintiff of such reassessment. That on July 7, 1942 Plaintiff paid under protest to the said Board of Equalization the sum of One Thousand Five Hundred Fourteen and 78/100 Dollars ($1,514.78) to cover payment of such reassessment of additional tax of One Thousand One Hundred Sixty-five and 22/100 Dollars ($1,165.22) plus Three Hundred Forty-nine and 56/100 ($349.56) interest thereon from July 15, 1937 to July 15, 1942, computed at the rate of six per cent (6%) per annum. That a true copy of said protest is attached hereto and marked Exhibit "A" and incorporated herein by reference.

That on the 5th day of September, 1942 and within the time provided in Section 23 of the California Retail Sales Tax Act, Plaintiff filed with the State Board of Equalization its claim for refund of said sum of One Thousand Five Hundred Fourteen and 78/100 Dollars ($1,514.78) and interest thereon. That a true copy of said claim for refund is attached hereto, marked Exhibit "B" and incorporated herein by reference.

That on September 16, 1942, the State Board of Equalization mailed to Plaintiff its notice that said claim for refund was denied by order of the State Board of Equalization on September 16, 1942. That Plaintiff, within the time prescribed by Section 31 of the California Retail Sales Tax Act, brings this action for recovery of said taxes and interest in
[fol. 8] the sum of One Thousand Five Hundred Fourteen and 78/100 Dollars ($1,514.78) so levied and assessed with respect to export sales of fuel oil to the New Zealand

Division of the Royal Navy, together with interest on such amount at the rate of six per cent (6%) per annum from date of payment thereof, to wit, July 7, 1942.

VI

That the amount sued for herein represents taxes and interest assessed and collected assertedly under the California Retail Sales Tax Act, as amended, with respect to an export sale in foreign commerce of Forty-three Thousand Seven Hundred Fifty-six and 85/100 (43,756.85) barrels of fuel oil to the New Zealand Government Stores Control Board acting on behalf of the New Zealand Division of the Royal Navy. That the "gross receipts" of the sale of said quantity of fuel oil was Thirty-eight Thousand Eight Hundred Forty and 70/100 Dollars ($38,840.70).

That the contract for sale of said quantity of fuel oil was entered into prior to March 12, 1937 by William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California, the predecessor in interest of Plaintiff as alleged in paragraph III hereinabove. That under date of December 3, 1936, the New Zealand Government Stores Control Board issued in New Zealand a written invitation for tenders for the supplying of a cargo of fuel oil required by the New Zealand Division of the Royal Navy, which invitation specified that the delivery of such fuel oil be "f. o. b. New Zealand Government tank steamer at any [fol. 9] port beyond New Zealand specified by the tenderer." That Hodder & Tolley, Ltd., a corporation, whose offices were and are in Palmerston North, New Zealand, had for approximately eight (8) years acted as agent in New Zealand for the said William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California (and for his respective predecessors, Richfield Oil Company of California and William C. McDuffie as Receiver in Equity for Richfield Oil Company of California) in the negotiation for sales in New Zealand of fuel oil distributed by the said William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California and his said respective predecessors. That such invitation by the New Zealand Government Stores Control Board for tenders was received in New Zealand by Hodder & Tolley, Ltd. and was forwarded on December 4, 1936 to William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California by

said agent, Hodder & Tolley, Ltd., with the latter's request for instructions and quotations. That thereafter William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California cabled to Hodder & Tolley, Ltd. in New Zealand the said Trustee's instructions and quotations for such tender, which instructions specified that the price quoted was f. o. b. ship's rail of buyer's tanker at the Richfield Marine Terminal at Long Beach, California. That Hodder & Tolley, Ltd., acting as agent as aforesaid, conducted in New Zealand negotiations with respect to such sale with the New Zealand Government [fol. 10] Stores Control Board on behalf of the said William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California.

That the said tender of William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California was thereafter accepted by the New Zealand Government Stores Control Board. That thereafter a written agreement for the sale of fuel oil dated February 4, 1937 was entered into in New Zealand between the New Zealand Government Stores Control Board and Hodder & Tolley, Ltd. as agent for and on behalf of the said William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California. That said written agreement dated February 4, 1937 provided for the supplying of fuel oil by the said William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California to the New Zealand Division of the Royal Navy and provided that the price of such fuel oil designated in said agreement was f. o. b. Los Angeles and provided further that delivery was to be made into New Zealand Naval tank steamer R. F. A. "Nucula" at Los Angeles, California. That said written agreement also provided that bills of lading and other customary shipping documents were to be handed to the Master of the "Nucula" and that the fuel oil was to be consigned to the Naval Officer In Charge, Auckland, New Zealand.

That said written agreement dated February 4, 1937 with the New Zealand Government Stores Control Board was one of the obligations of William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California which was assumed by Richfield Oil Corporation, [fol. 11] Plaintiff herein, in connection with the transfer of properties, property rights and assets on March 12, 1937

in pursuance of the reorganization proceedings under Section 77B of the National Bankruptcy Act described in paragraph III hereinabove; and that Plaintiff, Richfield Oil Corporation, performed the duties, liabilities and obligations of William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California as seller under said written agreement dated February 4, 1937 with the New Zealand Government Stores Control Board. That subsequent to March 12, 1937 the said Hodder & Tolley, Ltd. continued to act as agent for Plaintiff, Richfield Oil Corporation, in connection with the performance of said written agreement dated February 4, 1937.

That on May 14, 1937, Plaintiff delivered at its Long Beach California Marine Terminal into the New Zealand Naval tank steamer R. F. A. "Nucula" Forty-three Thousand Seven Hundred Fifty-six and 85/100 (43,756.85) barrels of fuel oil in bulk. That at the time of said delivery, a bill of lading dated May 14, 1937 was executed by the Master of the R. F. A. "Nucula," which bill of lading designated the Plaintiff, Richfield Oil Corporation, as shipper and provided that said quantity of Forty-three Thousand Seven Hundred Fifty-six and 85/100 (43,756.85) barrels of fuel oil was to be delivered to the Naval Officer In Charge, Auckland, New Zealand, at the Port of Auckland, New Zealand. That in connection with said delivery, Plaintiff executed and duly and regularly filed in the office [fol. 12] of the United States Collector of Customs at the Port of Los Angeles, California, on Customs Form 7525 a "Shipper's Export Declaration" describing said quantity of fuel oil and declaring the shipment thereof from Long Beach, California to Auckland, New Zealand. That in connection with said delivery, Plaintiff delivered to the Master of the R. F. A. "Nucula" the customary shipping documents consisting of copies of the run ticket, the inspector's certificate and the bill of lading.

That thereafter Plaintiff, Richfield Oil Corporation, received payment from the New Zealand Government Stores Control Board, Wellington, New Zealand, of the sum of Thirty-eight Thousand Eight Hundred Eighty-four and 70/100 Dollars ($38,884.70) representing the contract price of said fuel oil so sold and delivered, which payment was made pursuant to Plaintiff's invoice to the said New Zealand Government Stores Control Board. That Plain-

tiff has not at any time collected or invoiced or attempted to collect from the purchaser of said fuel oil the amount of the California Retail Sales Tax or any portion thereof. That thereafter and on or about June 21, 1937, Plaintiff paid to its agent, Hodder & Tolley, Ltd., a commission of 10¢ per ton of fuel oil so sold and delivered to the New Zealand Government Stores Control Board in pursuance of said written agreement described hereinabove, which commission was paid as compensation for the services performed in New Zealand in connection with the above described transaction by Hodder & Tolley, Ltd. as agent for Plaintiff and its predecessor William C. McDuffie as Re- [fol. 13] organization Trustee of Richfield Oil Company of California.

That the fuel oil so sold and delivered, as hereinabove alleged, was manufactured by Plaintiff and its predecessor William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California at the Richfield Refinery at Watson, California, from crude oil produced in the State of California. That there is not now nor at any of the times herein mentioned has there been oil produced in New Zealand or fuel oil manufactured in New Zealand in quantities sufficient to supply the requirements of the New Zealand Government Stores Control Board or of the New Zealand Division of the Royal Navy.

That the entire quantity of fuel oil, to wit, Forty-three Thousand Seven Hundred Fifty-six and 85/100 (43,756.85) barrels so sold and delivered by Plaintiff into the said tanker, R. F. A. "Nucula" was exported to and delivered to the New Zealand Division of the Royal Navy at Auckland, New Zealand, a Dominion of the British Empire, and that no portion thereof was delivered to or unloaded at ports of the United States of America and that no portion thereof was used or consumed by the purchaser thereof within the State of California or was used or consumed by the purchaser thereof during the transportation thereof to New Zealand.

VII

That at all times herein mentioned, it was the intention of all parties to the above described transaction, to wit, William C. McDuffie, as Reorganization Trustee of Richfield Oil Company of California, Plaintiff Richfield Oil [fol. 14] Corporation, Hodder & Tolley, Ltd., the New

Zealand Government Stores Control Board and the New Zealand Division of the Royal Navy that all of the acts and matters alleged in paragraph VI hereinabove, including (1) the issuance by the New Zealand Government Stores Control Board of a written invitation for tenders for the supplying of fuel oil; (2) the communications between Hodder & Tolley, Ltd. and William C. McDuffie, as Reorganization Trustee of Richfield Oil Company of California, relating to the Trustee's instructions and quotations for such tender; (3) the negotiations in New Zealand between the New Zealand Government Stores Control Board and Hodder & Tolley, Ltd. acting as agent for said Trustee as aforesaid; (4) the acceptance by the New Zealand Government Stores Control Board of the tender of the said Trustee; (5) the entering into in New Zealand of the written contract for sale of fuel oil dated February 4, 1937; (6) the delivery of said fuel oil by Plaintiff into the New Zealand Naval tank steamer R. F. A. "Nucula" at Plaintiff's marine terminal at Long Beach, California, together with the execution and delivery of the shipping documents described in paragraph VI hereinabove; (7) the transportation and delivery of the entire quantity of said fuel oil to the Port of Auckland, New Zealand; (8) payment to Plaintiff by the New Zealand Government Stores Control Board of the sales price of said fuel oil; and (9) payment by Plaintiff to Hodder & Tolley, Ltd. of the latter's commission, should constitute a single transaction. That at all times herein mentioned, it was the intention of all parties to [fol. 15] the above described transaction, to wit, William C. McDuffie, as Reorganization Trustee of Richfield Oil Company of California, Plaintiff Richfield Oil Corporation, Hodder & Tolley, Ltd., the New Zealand Government Stores Control Board and the New Zealand Division of the Royal Navy, that said full quantity of fuel oil be exported from California to New Zealand, a Dominion of the British Empire, without any interruption in the course of transportation and delivery thereof to the Port of Auckland, New Zealand.

VIII

That said taxes and interest thereon described in paragraph V hereinabove were erroneously and illegally collected. That said taxes and interest thereon were erroneously and illegally computed. That said taxes and interest

thereon are illegal for all of the reasons set forth in the Claim for Refund, a copy of which is attached hereto and marked Exhibit "B". That said sale of fuel oil was not taxable for all of the reasons set forth in said Claim for Refund attached hereto and marked Exhibit "B".

That said sale of fuel oil was and is exempt from tax pursuant to the provisions of Section 5 (a) of the California Retail Sales Tax Act, as amended. That the taxation by the State of California of such sale in export and foreign commerce was and is prohibited under the provisions of Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2 of the Constitution of the United States of America.

[fol. 16] IX

That if the California Retail Sales Tax Act, as amended, be construed, applied or enforced in such manner to impose said tax upon said sale of fuel oil hereinabove described, the said California Retail Sales Tax Act is invalid, illegal and unenforceable and contrary to and in violation of the provisions of Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2 of the Constitution of the United States of America.

X

That Defendant is indebted to Plaintiff in the sum of One Thousand Five Hundred Fourteen and 78/100 Dollars ($1,514.78) with interest thereon at the lawful rate from and after date of payment thereof on or about July 7, 1942 for money had and received by Defendant within two years last past for the use and benefit of Plaintiff, and that no part thereof has been paid Plaintiff.

Wherefore, Plaintiff prays for judgment against Defendant for the sum of One Thousand Five Hundred Fourteen and 78/100 Dollars ($1,514.78), together with interest thereon at the lawful rate from and after date of payment, to wit, on or about July 7, 1942; that Plaintiff have and recover from Defendant its costs and disbursements incurred and for such further relief as may be just and proper in the premises.

Dated: Los Angeles, California, December 8, 1942.

Robert E. Paradise, Attorney for Plaintiff.

* * * * * * *

[fol. 17] *Duly sworn to by W. T. Autrey. Jurat omitted in printing.*

EXHIBIT "A" TO COMPLAINT—July 6, 1942

State Board of Equalization
Sales Tax Division
Sacramento, California

Gentlemen:

Permit No. X-2535, District AA

Taxable Period April 1, 1937 to March 31, 1940

[fol. 18] Pursuant to your enclosed Notice of Reassessment dated July 1, 1942, there is enclosed our check made payable to your order in the sum of $1,514.78 representing additional retail sales tax for the above period in the sum of $1,165.22 plus $349.56 interest thereon to July 15, 1942.

Payment of this additional tax and interest is not intended as an admission of liability for any part of such sum as the payment is being made herewith under protest and under threat of penalties, suits, seizure of property and loss of license to transact business. It is our intention to file claims for refund of such tax and interest.

The Notice of Reassessment covers tax on an export sale of petroleum products to the New Zealand Division of the Royal Navy, as fully set forth in our Petition for Reassessment, Issue I, dated October 22, 1940, which petition has now been denied as to this particular transaction by your Notice of Reassessment dated July 1, 1942. The sale price of the products so sold in foreign commerce was $38,840.70 and said sales were and are exempt from tax under the provisions of Section V of the California Retail Sales Tax Act and taxation thereof by the State of California is prohibited under the provisions of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the Constitution of the United States.

We hereby reserve the right to file claim for refund of this illegal, erroneous and unconstitutional assessment and, if necessary, to institute and prosecute action for recovery [fol. 19] thereof together with interest thereon as provided by law.

Respectfully, Richfield Oil Corporation, by W. T. Autrey, Comptroller.

EXHIBIT "B" TO COMPLAINT

State of California

Before the State Board of Equalization

Claim for Refund by Richfield Oil Corporation for Overpayment of Retail Sales Tax

Permit No. X-2535, District AA

Period April 1, 1937 to March 31, 1940

Amount of claim: $1,514.78 and interest.

To the State Board of Equalization,
State of California:

Richfield Oil Corporation, hereinafter referred to as "taxpayer", hereby makes claim for refund of sales tax and interest thereon erroneously and illegally collected from it in the sum of $1,514.78 together with interest thereon from date of payment, on or about July 7, 1942, and for grounds for this claim states as follows:

The State Board of Equalization, hereinafter referred to as "Board", issued Notice of Assessment, Retail Sales Tax, [fol. 20] in the total sum of $354,096.73 against the taxpayer for the period April 1, 1937 to March 31, 1940, under date of September 25, 1940, and the taxpayer, under date of October 22, 1940, forwarded to the Board a Petition for Re-assessment of which issue I included protest against the Board's action in including in the measure of the additional tax assessment an amount of $38,840.70 representing an export sale to New Zealand of Petroleum products during the quarterly tax period April 1, 1937 to June 30, 1937. The additional tax assessed thereon at the rate of 3% amounts to $1,165.22. The Board by Notice of Reassessment dated July 1, 1942 notified the taxpayer that on May 7, 1942 it had reassessed tax of $1,165.22 and interest thereon to July 15, 1942 in the amount of $349.56, a total of $1,514.78, based on a measure of tax of $38,840.70 representing sales to the New Zealand Government Stores Control Board on behalf of the New Zealand Division of the Royal Navy, on the ground that review of the assessment disclosed no cause for adjustment of tax on such sales. Under date of July 6, 1942 the taxpayer forwarded to the Board with a letter of protest its check made payable to the order of the Board

in the total sum of $1,514.78 to cover payment of such reassessment of additional tax of $1,165.22 plus $349.56 interest thereon from July 15, 1937 to July 15, 1942, computed at the rate of 6% per annum.

The amount so paid represents tax and interest on account of an export sale in foreign commerce to the New Zealand Government Stores Control Board acting on behalf of the [fol. 21] New Zealand Division of the Royal Navy. The sale in question consisted of tangible personal property, to wit, 43,756.85 barrels of fuel oil; and the taxpayer is informed and believes and therefore states that as a part of the sales transaction such entire quantity of fuel oil was exported to New Zealand and that no part of such fuel oil was used or consumed by the purchaser within the State of California or was used or consumed by the purchaser during the transportation thereof to New Zealand.

The contract for supply of this fuel oil was made originally, prior to March 12, 1937, by William C. McDuffie, Reorganization Trustee of Richfield Oil Company of California, and in order to simplify the statement of facts to be recited hereinafter it will be explained why such contract was eventually fulfilled, after March 12, 1937, by this taxpayer (Richfield Oil Corporation). In pursuance of a Plan of Reorganization confirmed by the United States District Court, for the Southern District of California, Central Division, in proceedings, under Section 77-B of the National Bankruptcy Act, for the reorganization of Richfield Oil Company of California, the taxpayer claimant herein (Richfield Oil Corporation) acquired all of the business, properties and assets of Richfield Oil Company of California and of William C. McDuffie, as Reorganization Trustee of Richfield Oil Company of California, as of the close of business on March 12, 1937. As a part of said transfer the taxpayer claimant herein assumed all of the debts, liabilities [fol. 22] and obligations of William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California. Richfield Oil Company of California and William C. McDuffie, Reorganization Trustee of Richfield Oil Company of California will be referred to hereinafter as "Richfield" except where such word appears in the full name "Richfield Oil Corporation" in which case reference is being made to the taxpayer claimant herein.

Under date of December 3, 1936 the Secretary of the New Zealand Government Stores Control Board invited tenders

for the supply of a cargo of fuel oil required by the New Zealand Division of the Royal Navy. Such invitation for tenders was received in New Zealand by Richfield's agent, to wit, Hodder & Tolley, Ltd., Palmerston North, New Zealand, and was forwarded to Richfield on December 4, 1936 by Hodder & Tolley, Ltd. with the latter's request for instructions and quotations. Richfield thereafter cabled to Hodder & Tolley, Ltd. Richfield's instructions and quotations for such tenders and Hodder & Tolley, Ltd., acting as agent for Richfield, conducted negotiations with the New Zealand Government Stores Control Board.

Richfield's tender was thereafter accepted by the New Zealand Government Stores Control Board and thereafter a written agreement for the sale of fuel oil, dated February 4, 1937, was entered into between the New Zealand Government Stores Control Board and by Hodder & Tolley, Ltd. as agent for Richfield, such written agreement providing for the supply of fuel oil to the New Zealand Division of the [fol. 23] Royal Navy to be delivered at a designated price f.o.b. Los Angeles to the order of the Naval Secretary, Navy Office, Wellington, into New Zealand Naval tank steamer R. F. A. "Nucula" at Los Angeles, California. The agreement also provided that Bills of Lading and other customary shipping documents shall be handed to the Master of the "Nucula" and the oil consigned to the Naval-Officer-In-Charge, Auckland, New Zealand. Under date of February 5, 1937 Hodder & Tolley, Ltd. forwarded to Richfield a copy of such written agreement.

Pursuant to such written agreement dated February 4, 1937, the taxpayer on May 14, 1937 loaded at its Long Beach, California, terminal into the New Zealand Naval tank steamer R. F. A. "Nucula" 43,756.85 barrels of fuel oil in bulk to be delivered to the Naval Officer in Charge at the Port of Auckland, New Zealand, as evidenced by copy of Bill of Lading dated May 14, 1937, signed by Geo. Atwood, Master of the R. F. A. "Nucula" and now in taxpayer's possession. Such fuel oil was thereafter duly exported on May 15, 1937 from Long Beach, California, to Auckland, New Zealand, as evidenced by United States Customs Service Form 7527, Shipper's Export Declaration, a copy of which the Taxpayer has in its possession.

Thereafter, by invoice No. GX 5-11, the taxpayer billed the New Zealand Government Stores Control Board, Wellington, New Zealand, for the contract price of the fuel oil

in the amount of $38,840.70, plus $128.40 for inspection charge by Chas. Martin & Co. and plus $1,200.00 for cash [fol. 24] advanced by the taxpayer to Geo. Atwood, Master of the R. F. A. "Nucula." Neither at that time nor at any time since has the taxpayer invoiced or attempted to collect or collected from the purchaser any California retail sales tax whatsoever.

On or about June 21, 1937 taxpayer paid to its agent, Hodder & Tolley, Ltd., a commission of Ten Cents (10¢) per ton of fuel oil sold and delivered to the New Zealand Government Stores Control Board in pursuance of said written agreement referred to above, which commission was paid as compensation for the services of Hodder & Tolley, Ltd. in connection with the above described transaction. Such services were performed by Hodder & Tolley, Ltd. in New Zealand as agent for and on behalf of Richfield and taxpayer.

It was the intention of all parties to this transaction, to wit, Richfield; the taxpayer claimant; Hodder & Tolley, Ltd.; the New Zealand Government Stores Control Board; and the New Zealand Division of the Royal Navy, that the full quantity of fuel oil be exported to New Zealand without any interruption in the course of transportation and delivery thereof to the Port of Auckland, New Zealand. The taxpayer is informed and believes and therefore states that the entire quantity of fuel oil in question, referred to in the Notice of Assessment dated September 25, 1940 and in the Notice of Reassessment dated July 1, 1942, was delivered into said vessel by the taxpayer and was exported to and delivered to the New Zealand Division of the Royal Navy and that no portion thereof was delivered to or unloaded at ports of the United States of America and that [fol. 25] no portion thereof was used or consumed by the purchaser within the State of California or was used or consumed by the purchaser during the transportation thereof to New Zealand.

The taxpayer asserts that the transaction in question did not constitute a local sale subject to the tax imposed by the California Retail Sales Tax Act of 1933, as amended, but represented a sale and delivery in export and foreign commerce.

The sale price of the fuel oil so sold and delivered in export and foreign commerce was $38,840.70 and the California retail sales tax heretofore assessed and collected thereon by the State Board of Equalization is $1,165.22.

Said tax was erroneously and illegally computed, assessed, reassessed and collected by the said State Board of Equalization (1) because the said sale of fuel oil was and is exempt from tax pursuant to the provisions of Section 5(a) of the California Retail Sales Tax Act of 1933, as amended, and (2) because taxation by the State of California of such sale and delivery in export and foreign commerce was and is prohibited under the provisions of Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2, of the Constitution of the United States of America. If the California Retail Sales Tax Act of 1933, as amended, be construed, applied or enforced in such manner to impose said tax upon the sale of fuel oil, the said California Retail Sales Tax Act is invalid, illegal and unenforceable and contrary to [fol. 26] and in violation of the provisions of Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2 of the Constitution of the United States of America.

Wherefore, by reason of the foregoing facts and assertions, the taxpayer hereby makes claim for refund to it of said tax and interest so paid by it and wrongfully and unlawfully collected from it, in the amount of $1,165.22 tax and interest of $349.56 thereon to July 15, 1942, total $1,514.78, together with interest on such total amount at the rate of 6% per annum from date of payment thereof, on or about July 7, 1942, until paid or credited to the said taxpayer.

Richfield Oil Corporation, by W. T. Autrey, Comptroller.

STATE OF CALIFORNIA,
County of Los Angeles, ss.:

W. T. Autrey being duly sworn, deposes and says that he is Comptroller for the taxpayer making the foregoing claim; that he has read the same and knows the contents thereof and that the same is true of his own knowledge except as to matters therein stated on information and belief and as to such matters he believes it to be true.

W. T. Autrey.

[fol. 27] Subscribed and sworn to before me this 5th day of September, 1942. Remy C. Seat, Notary Public in and for said County and State. My Commission expires January 20, 1946. (Seal.)

[File endorsement omitted.]

IN SUPERIOR COURT OF SACRAMENTO COUNTY

ANSWER—Filed January 5, 1943

Comes now defendant, State Board of Equalization, and by way of answer to plaintiff's complaint, admits, denies and alleges as follows:

I

Admits the allegations contained in Paragraphs I, II, III and IV of said complaint.

II

Answering the allegations of Paragraph V of said complaint, defendant denies that the gross receipts in the sum of $38,840.70, referred to in said Paragraph V, represented the gross receipts of an export sale to New Zealand. Defendant further denies that the taxes and interest in the sum of $1514.78, referred to in said Paragraph V, were [fol. 28] levied and assessed with respect to export sales of fuel oil and in that regard defendant specifically alleges that the fuel oil sold to the New Zealand Navy was delivered to the purchaser in the State of California and that said sale was a completed sale in the State of California and that the gross receipts from said sale were gross receipts received from the sale of tangible personal property at retail in the State of California. Defendant admits the remaining allegations of said Paragraph V, save and except that defendant denies generally and specifically each and every allegation or ground of protest contained in Exhibit A and incorporated in said Paragraph V by reference, and denies generally and specifically each and every ground or allegation for refund contained in Exhibit B, incorporated in said Paragraph V by reference.

III

Answering Paragraph VI of said complaint, defendant admits the allegations contained therein, save and except that defendant denies that the taxes and interest assessed and collected were assessed with respect to an export sale in foreign commerce. In that respect, defendant alleges that said taxes assessed were measured by the gross receipts of a sale of tangible personal property at retail in the State of California.

IV

Defendant denies generally and specifically each and every allegation contained in Paragraph VII of said complaint.

[fol. 29]

V

Defendant denies generally and specifically each and every allegation contained in Paragraphs VIII, IX and X of said complaint.

Wherefore, defendant prays that plaintiff take nothing by its complaint filed herein and that defendant have judgment for its costs of court and for such other and further relief as to this court may seem meet and just in the premises.

Dated: January 4, 1943.

Robert W. Kenny, Attorney General; H. H. Linney, Assistant Attorney General; Adrian A. Kragen, Deputy Attorney General, Attorneys for Defendant.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

The undersigned, being duly sworn, says: I am a citizen of the United States, over the age of eighteen years, a resident of the City and County of San Francisco, State of California, and not a party to the above entitled action;

Robert E. Paradise, Esq., the attorney of record of the above-named Plaintiff maintains an office at 555 South Flower Street, in Los Angeles, County of Los Angeles, State of California; and between said two places there is a regu-
[fol. 30] lar communication by mail; on the 4th day of January, 1943, I served a true copy of the Answer herein, to the original of which this affidavit is attached, on said last-named attorney of record, by depositing said copy on said date in the post office at the said City and County of San Francisco, enclosed in a sealed envelope addressed to said

attorney at the office thereof, and prepaying the postage thereon.

Janet Gardner.

Subscribed and sworn to before me, this 4th day of January, 1943. Adrian A. Kragen, Deputy Attorney General.

[File endorsement omitted.]

IN SUPERIOR COURT OF SACRAMENTO COUNTY

STIPULATION AS TO CERTAIN FACTS—Filed March 8, 1943

It Is Stipulated:

(1) That Exhibit "A" attached hereto is a true and correct copy of the request of the New Zealand Government Stores Control Board, hereinafter for brevity referred to as "Control Board," referred to in Paragraph VI of the complaint.

Exhibit "B" is a true and correct copy of the written contract alleged in said Paragraph VI of the said complaint to have been entered into on the 4th day of February, 1937, [fol. 31] for the sale of said fuel oil, except that the pencilled figures and check-marks appearing upon the second page of specifications are not part of the said contract, but were added to the copy of the said agreement in possession of the plaintiff herein from which the said photostatic copy was taken.

Exhibit "C" is a true and correct copy of the export declaration referred to in said Paragraph VI of the complaint, and

Exhibit "D" is a true and correct copy of the bill of lading executed by the Master of the R. F. A. "Nucula" referred to in Paragraph VI of said complaint.

(2) That payment for the said fuel oil was made by the said Control Board in London, Kingdom of Great Britain, to the duly authorized agent of the plaintiff herein.

(3) It Is Further Stipulated that after the submission by Hodder & Tolley, Ltd., as agent for Wm. C. McDuffie, acting as Reorganization Trustee of Richfield Oil Company

of California, of the bid of said Wm. C. McDuffie, as said Reorganization Trustee, the said Control Board requested Hodder & Tolley, Ltd., to ascertain if the bid could be understood as submitted for one or two cargoes of oil at the option of the said Control Board, and said Wm. C. McDuffie, acting as said Reorganization Trustee of Richfield Oil Company of California, by cable authorized said Hodder & Tolley, Ltd., to advise the said said Control Board that the said bid submitted could be accepted by said Control Board at its option for one or two cargoes of fuel oil of approximately 6500 tons each, and said Hodder & Tolley, [fol. 32] Ltd., did so notify the said Control Board; that thereafter, the said Control Board elected to accept the said bid for two cargoes of fuel oil, and as alleged in Paragraph VI of said complaint, executed and delivered to Hodder & Tolley, Ltd., as agent of Wm. C. McDuffie, acting as Reorganization Trustee of Richfield Oil Company of California, the written contract or agreement, a copy of which is attached hereto as aforesaid as Exhibit "B" to the complaint, and it is further stipulated that upon receipt at Palmerston, New Zealand by Hodder & Tolley, Ltd. of the said contract or agreement, the said Hodder & Tolley, Ltd., as agent in New Zealand for said Wm. C. McDuffie, acting as Reorganization Trustee of Richfield Oil Company of California, executed a duplicate copy of said contract or agreement and delivered the same to said Control Board at Wellington, New Zealand.

(4) It Is Further Stipulated and Agreed that the first cargo of fuel oil was delivered by plaintiff to the R. F. A. "Nucula" on or about the 15th day of March, 1937, at the Marine Terminal, Long Beach, California, and transported by "Nucula" to Auckland, New Zealand, and that the second cargo, on which the said tax sought to be recovered in this action was levied, was delivered to the said R. F. A. "Nucula" by plaintiff on or about the 14th day of May, 1937, as alleged in Paragraph VI of said complaint. That said first shipment was handled and payment made for it in substantially the same manner as alleged in Paragraph VI of said complaint with reference to the said second ship- [fol. 33] ment. Payment for first shipment was made to Plaintiff's agent in London.

(5) It Is Further Stipulated, subject to the competency, relevancy and materiality of the facts herein stipulated to,

that if the plaintiff were to produce as witnesses the said Wm. C. McDuffie, and the proper servants, agents, officers and employees of Wm. C. McDuffie, acting as Reorganization Trustee of Richfield Oil Company of California, of Hodder & Tolley, Ltd., of the plaintiff Richfield Oil Corporation, of the said Control Board and of the New Zealand Division of the Royal Navy, that each of said witnesses would testify to the truth of the facts alleged in Paragraph VII hereon.

The defendant, while stipulating that said witnesses, if called, would so testify, does not believe that such testimony would be competent, relevant or material, and specifically reserves the right to object to the introduction of Paragraph (5) on the ground that the facts to which it is stipulated the witnesses would testify are not competent, relevant or material; and it is specifically agreed that the defendant shall have the same right to so object to the introduction of said paragraph (5) as it would if any of the said witnesses were personally present and testifying on the stand.

Dated: March 5th, 1943.

Robert E. Paradise, Norman S. Sterry, Gibson, Dunn & Crutcher, by Norman S. Sterry, Attorneys for [fol. 34] Plaintiff. Robert W. Kenny, Attorney General; H. H. Linney, Assistant Attorney General; Adrian A. Kragen, Deputy Attorney General; by Adrian A. Kragen, Attorneys for Defendant.

EXHIBIT "A" (PLAINTIFF'S EXHIBIT NO. 1)

Richfield Oil Co. Received Dec. 28, 1936. B. D. Blanchard.

New Zealand Government Stores Control Board

Tender Schedule No. 28—Oil Fuel for N. Z. Division of the Royal Navy

Tenders are invited for the supply of one cargo of 6,500 tons (approx.) of oil fuel required by the New Zealand Division of the Royal Navy for delivery f. o. b. N. Z. Government tank steamer at any port beyond New Zealand specified by

the tenderer. Delivery to be taken about the middle of March, 1937.

Alternative tenders are required for payment as under:

(1) Net cash, Wellington, New Zealand.

(2) Net cash, London, England.

[fol. 35] Conditions of Tender:

1. Tenders must be in writing and must be enclosed in a sealed envelope, marked on the outside "Tender for Fuel Oil", and must reach the Secretary, New Zealand Government Stores Control Board, Wellington, not later than 4 p. m. on Tuesday, 12th January, 1937.

Tenders must hold good for 30 days.

2. The oil fuel must be in accordance with Specification S. C. B. 28/1 attached.

3. Tenderers must state the specific gravity of the oil offered.

4. No advertisement relative to the acceptance of this tender shall be published in any newspaper, journal or other advertising medium unless such advertisement has first been submitted to and approved by the New Zealand Government Stores Control Board.

5. The lowest or any tender will not necessarily be accepted.

P. Glenn, Secretary.

Wellington, 3rd December, 1936.

[fol. 36] EXHIBIT "B" (PLAINTIFF'S EXHIBIT No. 2)

S. C. B. 5/10/2

N. Z. Govt Stores Control Board,

Wellington, N. Z.

4th February, 1937.

"Richfield Oil Co. Received Mar. 15, 1937. B. D. Blanchard."

"Rec'd. Mar. 15, 1937. E. C. Hayes."

Messrs. Hodder & Tolley, Ltd., Box 136, Palmerston North.

GENTLEMEN:

I am directed to advise that your tender dated 13th January, 1937, is accepted for the supply of two cargoes each of 6500 tons (approx) of oil fuel to the New Zealand Division of the Royal Navy, subject to the following conditions—

(1) *Price* 24/8.4 per ton of 2240 lbs Fob Los Angeles, payment in London, with conversion at $4.90 to £. any variation at date of payment to be to the account of the Naval Department.

(2) *Payment* shall be made by the High Commissioner for New Zealand in London to the credit of the Richfield Oil Co., Los Angeles, at Barclay's Bank, Chief Foreign Branch, London.

(3) *Delivery* shall be given to the order of the Naval Secretary, Navy Office, Wellington, into N. Z. Naval tank steamer R. F. A. "Nucula" at Los Angeles, California. Delivery of the first cargo shall be given on or about the 15th March, 1937, and of the second cargo on or about the 21st May, 1937, or as at such other time as may be mutually agreed upon.

[fol. 37] (4) The oil supplied shall conform in all respects to the specification copy of which is attached. *Note:* It is particularly desired that the hard asphalt content be as low as possible and not more than 2%.

(5) The oil shall be inspected by Messrs. Charles Martin & Co. at a cost of two cents per ton.

(6) The Master of the "Nucula" shall wireless the Richfield Oil Co. when seven days and also when 24 hours out from Los Angeles.

(7) The Richfield Oil Co. shall advance to the Master of the "Nucula" at Los Angeles a sum in dollars the equivalent of up to £300 to meet disbursements at port of loading on each trip, such advance to be repaid when payment is made for the fuel oil.

(8) Bills of lading and other customary shipping documents shall be handed to the Master of the "Nucula" and the oil consigned to the Naval-Officer-In-Charge, Auckland, New Zealand.

(9) Should there be any breach of these conditions on the part of the contractors or their authorized agents this agreement may be summarily determined by the Accounting Officer of the N. Z. Naval Tank Steamer present for the purpose of accepting delivery of the fuel oil at the port of delivery, giving notice in writing to that effect to the contractor's agents, or by the Naval Secretary at Wellington giving notice in a like manner to the contractors at [fol. 38] their registered office at Wellington, New Zealand.

(10) No advertisement relative to the contract shall be published in any newspaper, Magazine, journal or other advertising medium unless such advertisement has first been submitted to and approved by the Stores Control Board.

Please confirm by signing the attached duplicate of this agreement and returning to me at your earliest convenience.

Yours faithfully, —— ——, Secretary.

(Rec'd Mar. 15, 1937. E. C. Hayes.)

New Zealand Government Stores Control Board

Specification S. C. B. 28/1—Oil Fuel for the New Zealand Division of the Royal Navy

Flash Point: Not to be lower than 175° F. as obtained by the Pensky-Marten close test.

Sulphur: Not to exceed 1.5%.

Acidity: The oil fuel supplied shall be free from inorganic acidity and as free as possible from organic acidity.

[fol. 39] *Water:* Not to exceed 0.5%.

Viscosity: Not to exceed 1,000 seconds for an outflwo of 50 cubic centimetres at a temperature of 32° F., as determined by Redwood's Standard Viscometer No. 11 (Admiralty type for testing oil fuels).

Notwithstanding that the maximum viscosity allowed by the general specification is 1,000 seconds at 32° F. the actual warranty or condition of contract will be the figure guaranteed by the firm tendering.

Calorific Value: Not less than 18,400 B.T.U.'s per lb.

Specific Gravity: 0.89 to .946 at 60° F. (Approximately .94 preferred).

Impurities: The oil shall be free from earthy, carbonaceous or fibrous matter or other impurities which are likely to choke the burners.

Note: In the case of Persian Oil Fuel the viscosity is not to exceed 1000 seconds at 40° F. and a bottle test is to be carried out as follows—

About 200 mls. of the sample as received are filtered at laboratory temperature through 36 mesh wire gauze and placed in a pint bottle of 2¾ ins. internal diameter. The bottle is then carefully packed in melting ice in an ice chest in such a manner that the oil is maintained at 32° F. [fol. 40] for a period of at least 16 hours and not more than 24 hours. The bottle is then removed and gently inverted. If the oil is wholly or partially set, the bottle is shaken for not more than 5 seconds. The oil when subjected to the "Bottle" test must either—

(a) Flow as a uniform liquid or

(b) If partically or wholly set flow as a uniform liquid when shaken as above. The sulphur content is not to exceed 3%.

Wellington, 3rd December, 1936.

(Rec'd Mar. 15, 1937. E. C. Hayes.)

New Zealand Government Stores Control Board

Specification S. C. B. 28/1—Oil Fuel for the New Zealand Division of the Royal Navy

Flash Point: Not to be lower than 175° F. as obtained by the Pensky-Marten close test.

Sulphur: Not to exceed 1.5%.

Acidity: The oil fuel supplied shall be free from inorganic acidity and as free as possible from organic acidity.

Water: Not to exceed 0.5%. (Note: In pencil figures: "March, 1935 bid allowed 1.0%")

Viscosity: Not to exceed 1,000 seconds for an outflow of 50 cubic centimetres at a temperature of 32° F., as deter- [fol. 41] mined by Redwood's Standard Viscometer No. 11 (Admiralty type for testing oil fuels).

Notwithstanding that the maximum viscosity allowed by the general specification is 1,000 seconds at 32° F. the actual warranty or condition of contract will be the figure guaranteed by the firm tendering.

Calorific Value: Not less than 18,400 B. T. U.'s per lb.

Specific Gravity: 0.89 to .946 at 60° F. (approximately .94 preferred). (Note: Pencil figures: ("19 A. P. 1"))

Impurities: The oil shall be free from earthy, carbonaceous or fibrous matter or other impurities which are likely to choke the burners.

Note: In the case of Persian Oil Fuel the viscosity is not to exceed 1,000 seconds at 40° F. and a bottle test is to be carried out as follows:—

About 200 mls. of the sample as received are filtered at laboratory temperature through 36 mesh wire gauze and placed in a pint bottle of 2¾ ins. internal diameter. The bottle is then carefully packed in melting ice in an ice chest in such a manner that the oil is maintained at 32° F. for a period of at least 16 hours and not more than 24 hours. The bottle is then removed and gently inverted.
[fol. 42] If the oil is wholly or partially set, the bottle is shaken for not more than 5 seconds.

The oil when subjected to the 'Bottle' test must either—

(a) flow as a uniform liquid; or

(b) if partially or wholly set flow as a uniform liquid when shaken as above.

The sulphur content is not to exceed 3%.

Wellington, 3rd December, 1936.

(Here follow 2 photolithographs, side folios 43, 43a.)

EXHIBIT "C"

Customs Form 7525
U.S. DEPARTMENT OF THE TREASURY
File No.

UNITED STATES CUSTOMS SERVICE

☞ Read carefully the instructions on back to avoid delay at shipping point

SHIPPER'S EXPORT DECLARATION

OF SHIPMENTS TO FOREIGN COUNTRIES OR NONCONTIGUOUS TERRITORIES OF THE U.S.

☞ Clearance will not be granted until shipper's declaration has been filed with the Collector of Customs
(Declarations should be typewritten or prepared in ink. Pencil is not permissible.)

Customs File No.

Shipper's Code Nos.

Importer	Port
Plus	Country

Goods shipped by RICHFIELD OIL CORPORATION
(Name of actual shipper) – If shipped by AGENT, insert name and address of principal, seller, or consignor on second line below.

Address 555 South Flower Street, (Number) (Street) Los Angeles, (City) California (State)

Shipment invoiced by RICHFIELD OIL CORPORATION
(If shipped by AGENT, insert name and address of principal, seller, or consignor)

For shipment on the New Zealand Navy Tanker "Pueblo"
(Name of carrier. If vessel, give name and nationality)

From Long Beach, Calif. To *final* country of destination Auckland, (City) New Zealand (Country)
(U. S. Customs port of export) (Not country where transshipped)

Marks and numbers	Number and kind of packages	DESCRIPTION OF GOODS (Describe each kind of goods in detail. Do not use general terms such as "merchandise," "goods," "machinery," "parts," etc. (See instructions on back, par. 3)	Net quantity in pounds, long tons (of 2,240 pounds), gallons, yards, bushels, barrels, etc., as required by Schedule B	Value at Time and Place of Export		Statistical Class No., Schedule B
				U. S. Products, including foreign goods shipped or remanufactured in the United States	Foreign products in same condition as imported	
			Barrels	(Report whole dollars — no cents nor symbols)		
NIL	In Bulk	Fuel Oil	43,757	899,381		9033

Waybill or manifest No. _____ May 15, 1937 (Date of exportation) Total, $ 39,381

I authorize _____ to act as my agent

for customs purposes. _____, Shipper.

I declare that the above is a true account of merchandise shipped to the country named; and that the description and quantity of each article is truly stated at the selling price or market value at time and place of exportation.

Plaintiff's Exhibit No. 3

(Signature) B W Blanchard

Sworn and subscribed to before me

on _____, 193

(Capacity) Agent (Member of firm, secretary, agent, etc.)

(Address) 555 So. Flower St., Los Angeles, California

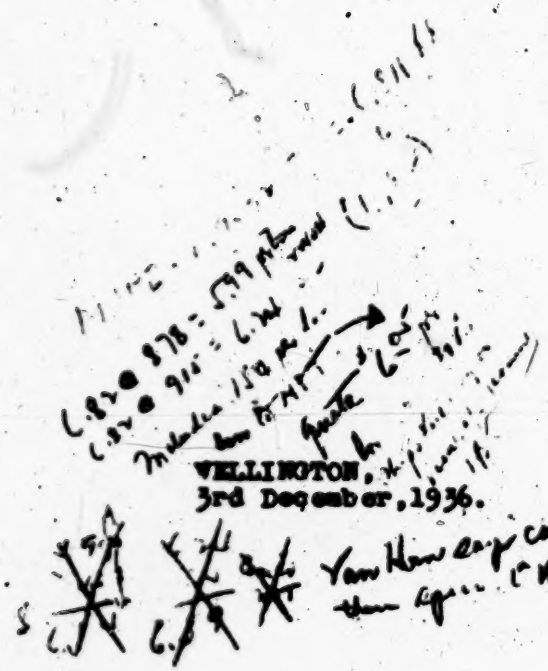
(Clerk, notary public, or other authorized person)

EXHIBIT "C"

EXHIBIT "B"

IMPURITIES:

A. **Note:** In



WELLINGTON,
3rd December, 1936.

EXHIBIT "B"

[fol. 44] EXHIBIT "D"

(Plaintiff's Exhibit No. 4.)

Non-Negotiable Copy

RICHFIELD OIL CORPORATION

555 South Flower Street

Los Angeles, Cal.

Shipped in apparent good order and condition by Richfield Oil Corporation on board the British Steamship called the R. F. A. Nucula whereof G. Atwood is master, now lying in the Port of Long Beach, California and bound for Auckland, New Zealand, to say 43,756.85 bbls., of 42 U. S. Measured Gallons; Fuel Oil in bulk @ 60° F., equivalent to 6,419.95 Long Tons of 2240 lbs. to be delivered at the Port of Auckland, New Zealand or so near thereto as she can safely get always afloat unto Naval Officer in Charge, Auckland, New Zealand or to his or their assigns, he or they paying freight at the rate of as agreed Contents, quality, weight and gauge unknown.

Not responsible for leakage or deterioration of quality.—General Average Payable according to York-Antwerp Rules of 1924, and as to matters not therein provided for, according to usages and customs of the port of San Francisco. In case a General Average Statement to be required, the same to be adjusted at San Francisco by adjusters to be appointed by the Owners, who are to attend to the settlement and collection of the average, subject to customary charges. Should the vessel put into a port of distress or be [fol. 45] under average, she is to be consigned to Owner's Agents, paying them the usual charges and commissions.

It is Mutually Agreed that the Ship shall have liberty to sail without pilots; to tow and assist vessels in all situations; to deviate for the purpose of saving life or property; that the carrier shall have liberty to convey goods in lighters to and from the ship at the risk of the owner of the goods, and, in case the ship shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to tran-ship the goods to their destination by any other steamship.

It is also Mutually Agreed, that the Carrier shall not be liable for loss or damage occasioned by causes beyond his

control, by the perils of the sea or other waters, by fire from any cause wheresoever occurring; by barratry of the master or crew, by enemies, pirates, or robbers, by arrest and restraint of princes, rulers or people, riots, strikes, or stoppage of labor; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, by collisions, stranding, or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default or error in judgment of the pilot, master, marines, or other servants of the ship owner, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them or by the Ship's Husband or Manager); nor for the heating, decay, putrefaction, rust, sweat, change of character, [illegible] leakage, breakage, or any loss or damage arising [illegible] nature [fol. 46] of the goods or the insufficiency [illegible] nor for land damage; nor for the obliteration [illegible] insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk, or transshipment; nor for any loss or damage caused by the prolongation of the voyage.

It is Mutually Agreed that if due diligence shall have been exercised to make the vessel in all respects seaworthy and to have her properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster, resulting from accident, or faults or errors in navigation, or in the management of the vessel, or from any latent defect in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees or owners, of the cargo shall, nevertheless, pay salvage and any special charges incurred in respect of the cargo, and shall contribute in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the vessel, or any latent defect or unseaworthiness.

1. It is also Mutually Agreed that the Carrier shall not [fol. 47] be liable for Gold, Silver, Bullion, Specie, Documents, Jewelry, Pictures, Embroideries, Works of Art, Silks, Furs, China, Porcelain, Watches, Clocks or for goods of any description which are above the value of $500 per package, unless Bills of Lading are signed therefor, with the value therein expressed, and a special agreement is made.

2. Also, that shippers shall be liable for any loss or damage to ship or Cargo caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature, whether such Shipper be Principal or Agent, and such goods may be thrown overboard or destroyed at any time without compensation.

3. Also, that the Carrier shall have a lien on the goods for all fines or damages which the ship or cargo may incur or suffer by reason of the incorrect or insufficient marking of packages or description of their contents.

4. Also, that in case the ship shall be prevented from reaching her destination by Quarantine, the Carrier may discharge the goods into any Depot or Lazaretto, and such discharge shall be deemed a final delivery under this contract, and all the expenses thereby incurred on the goods shall be a lien thereon.

5. Also, that if the goods be not taken by the consignee within such time as is provided by the regulation of the port of discharge, they may be stored, by the Carrier, at the expense and risk of their owners.

6. Also, that full freight is payable on damaged goods, [fol. 48] but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

7. Also, freight is to be considered as earned upon shipment and is to be retained by the ship owners, vessel or cargo lost or not lost.

8. Also, the owner shall have a lien on the cargo for all freight, hire, advances, charges, dead freight, demurrage, cost of recovering same, taxes, duties and fines, which may be incurred or sustained or be imposed upon it, and all expenses to owner resulting from any errors or omissions

of charterer. Dues and other charges upon the cargo shall be paid by charterer, and dues and other charges upon the vessel shall be paid by owner.

9. Also, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the Carrier shall be entitled to recover the difference from the shipper.

10. Also, that in the event of claims for short delivery when the ship reaches her destination, the price shall be the market price at the port of destination on the day of the Ship's entry at the Custom House, less all charges saved.

11. All conditions and exceptions contained in Charter Party dated ——— —, —— are hereby made a part of this bill of lading.

And Finally, in accepting this Bill of Lading, the Shipper, the Owner, and Consignee of the goods and the holder of [fol. 49] the Bill of Lading, agree to be bound by all of its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such Shipper, Owner, Consignee or Holder.

In Witness Whereof, the Master or Agent of the said Ship hath affirmed to three Bills of Lading all of this tenor and date numbered consecutively, one of which being accomplished, the others to stand void.

It is also Mutually Agreed that shipment made hereunder is subject to all of the provisions of Sections 4281, 4282 and 4283 of the Revised Statutes of the United States and the amendments thereto, and of Section 3 of the Act of Congress of the United States, approved February 13, 1893, and entitled "An Act Relating to the Navigation of Vessels," etc.

Dated in Long Beach, Calif. this 14th day of May, 1937.

Geo. Atwood, Master.

[File endorsement omitted.]

[fol. 50] IN SUPERIOR COURT OF SACRAMENTO COUNTY

[Title omitted]

MINUTE ENTRY OF HEARING—March 17, 1943

The above entitled cause came on regularly for hearing before the Court this day with Norman S. Sterry of counsel for the Plaintiff and A. A. Kragen, of counsel for the Defendant, appearing in Court. Thereupon counsel informed the Court that the cause would be submitted on the briefs and stipulation of facts heretofore filed herein. Counsel thereupon argued the points to the Court and at the conclusion of the argument counsel for the plaintiff filed his "Opening Brief." Counsel for Defendant is granted 15 days in which to reply thereto. At this time Mr. Thomas O'Hara appeared on behalf of the Alien Property Custodian and request- permission to file Briefs as Amicus Curiæ. The request was granted.

[fol. 51] IN SUPERIOR COURT OF SACRAMENTO COUNTY

SUPPLEMENTAL STIPULATION OF FACTS—Filed March 17, 1943

Supplemental to the stipulation of March 5, 1943, it is further stipulated and agreed between the parties as follows:

(6) That plaintiff's refinery at Watson is located about midway between the City of Los Angeles and the Marine Terminal at Long Beach, California. At all times mentioned in the complaint the plaintiff and its predecessor in interest maintained storage tanks at said Marine Terminal, connected with the refinery tanks of plaintiff and its predecessor in interest at Watson by a pipe line.

(7) That at this time the plaintiff does not have any record of receiving any wireless message from the master of the "Nucula" on either voyage other than those required by the contract, i.e., a wireless message advising when the vessel was approximately seven days out from the Marine Terminal, and another when twenty-four hours out. It was customary, however, for tankers approaching a port after first wirelessing their position to keep the

shipper advised of their daily progress. As to each cargo, when the plaintiff was advised that the said "Nucula" was between twenty-four and forty-eight hours out from Marine Terminal, Long Beach, plaintiff started pumping oil from its refinery tanks at Watson to its storage tanks at said Marine Terminal and continued the pumping until the entire cargo had been pumped into the storage tanks. The said oil was pumped from the storage tanks into the [fol. 52] "Nucula" as soon as it had docked and was ready to receive the oil. There are no records available to show whether on either trip the "Nucula" was ready to receive the oil before the entire cargo had been pumped into the storage tanks, but the oil was not held in the tanks more than twenty-four to thirty-six hours before the plaintiff started pumping it from the storage tanks into the "Nucula". After the pumping of said oil from the storage tanks into the "Nucula" was started, it was continued without interruption until the entire cargo was delivered into the tanks of the "Nucula".

Dated: March 13, 1943.

Robert S. Paradise, Norman S. Sterry, Gibson, Dunn & Crutcher, By Norman S. Sterry, Attorneys for Plaintiff, Robert W. Kenny, Attorney General, H. H. Linney, Assistant Attorney General, Adrian A. Kragen, Deputy Attorney General, By Adrian A. Kragen, Attorneys for Defendant.

[File endorsement omitted].

IN SUPERIOR COURT OF SACRAMENTO COUNTY

OPINION OF THE COURT—Filed April 28, 1943

This is an action to recover a sum of money paid as a [fol. 53] sales tax assessed against the plaintiff upon a sale of oil to the New Zealand Government.

I will discuss the facts which have all been stipulated to as if they were herein set forth. The Plaintiff claims that this was an export sale exempted from tax or impost by the Constitution of the United States, Defendant contends that as the oil was delivered to the purchaser at the port of Long Beach, in California, that the sale was a local

sale, consu-mated in this State and subject to local law. Defendant takes the position also that a sales tax is one levied upon all sales transactions in California without discrimination that it is not the kind of tax or impost which the Constitution was meant to forbid.

Before entering upon a discussion of these questions it might be well to state some well settled principles which may govern their decision. In an early case it was stated that until goods in a state had actually begun to move in process of exportation that they must be regarded as not only in the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination in the usual way and manner in which such property is taxed in the State.

Coe vs. Errol 29 Law Ed. 715.

This exemption from constitutional protection, and statement of liability to taxation has never been more strongly [fols. 54-55] asserted or clearly defined. In view of the frequent claim that the recent cases have narrowed the protection given to interstate and export transactions, it is well to keep this fact in mind. In this same case it was stated when goods or a shipment took on the character of exports and became entitled to the protection of the Constitution, they become such "when actually started in the course of transportation to another state or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose in which they commence their final movement for transportation from the state of their origin to that of their destination."

Coe vs. Erroll 29 Law Ed. 715.

Again it may be said that this method of measurement has never been changed, nor has the character of goods as exports while actually in process of exportation and on their way from the point of origin to their destination in a foreign country ever been questioned. The third principle announced in that case was, and this was no novelty, that once the export shipment had started and while the goods

were in course of transportation they were "clearly" exempt from state taxation.

This principle too has never been contradicted; it cannot be if any meaning is to be given to the Constitution which says that no State shall, without the consent of Congress, lay any impost upon exports. Accepting these principles [fol. 56] as settled, the movement of the oil in this case, as an export, if it was an export, began when plaintiff began pumping into its receptacles at Long Beach in readiness to deliver it into the tanks of the Nucula, which had just notified it that it would be ready to receive the oil within a few hours. It therefore becomes necessary for plaintiff to show that by some process at the moment of the sale the character of the oil as export had ceased and that for an appreciable period it had become a part of the general property of the State. It is in this particular that the modern cases have shown a tendency to depart from the earlier decisions and to take a position more favorable to the taxing power of the State. They have not done this by modifying the conditions under which goods become exports, or changing the period at which they take on that character, or the rule that goods after they have become export in character cannot be taxed while in process of moving from their domestic origin to their foreign destination. What the later cases have done is to more carefully scrutinize an interstate transaction and to a lesser extent an export one to determine at what moment the shipment began and at what moment it ended, and to find if at any part of the journey and for any period of time the interstate or export movement had ceased, and to hold that up to the moment of the beginning of the shipment and at the moment it ceased or for the moment a shipment may have been interrupted, the goods become assessable for normal state taxation. This attitude of the modern cases followed the [fol. 57] great increase of trade and movement of goods, the various methods of their transport, the speed with which such transactions are now effected, and the vast increase in revenue now needed for state and national administration. A fine example of such modern decisions is Standard Oil Co. vs. Johnson 132 Pac 2nd, 910 and Chicago Bridge and Iron Works vs. Johnson, 19 Cal 2nd, 162; and cases cited therein. One of the most advaneed of these decisions is that of McGoldrick vs. White, etc. 84 Law Ed. 565 in which the Court go into detail in describing the con-

ditions under which taxes which may indirectly and incidentally affect interstate trade may legally be levied. Neither in the case itself nor in the incidents it referred to was it held that a tax could be imposed on goods while in the actual process of transport. The tax which is validated was a tax imposed after goods which had been in interstate transit had reached their destination. In cases with which it illustrated the correctness of its position the tax preceded the shipment. In the case before me defendant contends that whatever the contract of purchase and sale had been that the sale was completed when the oil was delivered on the vessel at Long Beach; that there plaintiff delivered the oil and the title passed to the purchaser in New Zealand, and that the sale having thus been consu-mated in California our sales tax properly applied to it. I don't think that this reasoning can be sustained in the circumstances of this case.

If the whole transaction as planned by the parties constituted an arrangement for an export which was finally [fol. 58] carried out, the fact of connecting carriers, intermediate deliveries, reshipments, successive bills of lading and consignors, have always been held to have been but steps in a steady movement of the goods which constitutes one export journey. Conclusive of this case and contrary to the contention of defendant is the case of A. G. Spaulding vs. Edwards, 67 Law Ed. 865. This case in all essential particulars is identical with the case before me. In the Spaulding case a firm in Venezuela desired to purchase in New York a bill of sporting goods and gave directions to a brokerage firm in New York to procure the goods and to arrange for their shipment to Venezuela. The brokers purchased the goods from the Spaulding Brothers giving them full shipping directions. These the Spauldings complied with, delivered the goods upon a carrier, properly labeled, and received a receipt from the carrier which they delivered to the brokers. The brokers accepted delivery of the goods, took out a bill of lading, in their own name and paid to the Spaulding Brothers the purchase price of the goods. It was conceded by the court that thereupon the title to the goods shipped passed from the Spaulding Brothers. The Court in that case stated that in view of the fact that the Spauldings had made delivery of the goods to the brokers and had passed title to them, the question was, was the sale by them a separate independent local sale, or a step

in exportation. It was definitely held to have been the latter and a part of the exportation.

Using language directly applicable to the case before us [fol. 59] the Court said speaking through Mr. Justice Holmes, that "no one would doubt that they (the sporting goods) were exempt after they had been loaded upon the vessel for Venezuela, and the bill of lading issued. ——. The very act that passed the title and that would [illegible] incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export, and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port".

Delivery to an intermediary who is collecting goods for export does not deprive the goods of their character as export goods where they are later exported in pursuance of a previous plan to that effect. In the case of Southern Pacific Terminal Co. vs. Interstate Commerce Commission, 55 Law Ed. 310, one Young was "a merchant and manufacturer engaged in buying, selling and converting cotton seed cake for his own account." His business consisted "in buying cotton seed cake in the interior shipping it to himself by carloads at pier "C", there grinding it into meal, sacking it and loading it into steamships berthed at pier "C" for export." The Court held that the purchase of the cake by Young, its shipment to him in his own name and its concentration on the wharf, were "but incidents under the circumstances presented by the record in the transshipment of the products in export trade." There was an intermediate delivery, or a succession of them in Texas, etc. Co. vs. Sabine Tram Co., 57 Law Ed. 442, but the court held [fol. 60] that such deliveries did not change the character of the transactions as an export shipment. Broken journeys, successive way bills or intermediate deliveries are not the tests by which the nature of a shipment is measured. It is its essential character which determines whether it is a local sale, an interstate transaction or an export shipment.

The delivery of oil to the Southern Pacific Co., in Standard Oil Co. vs. Johnson, 132 Pac. 2nd, 910, was under such circumstances that that company could have changed the destination of the shipment or to have retained it in California. In State vs. Blind Bull Coal Co., 101 Pac. 2nd 70, the coal was delivered to the purchasers to do with as they pleased. In Superior Oil Co. vs. Mississippi, 74 Law Ed.

504, the Court said of a sale which it held not to have been interstate: "But here the gasoline was in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana, except its own wishes." Such a delivery deprives a shipment of any previously attempted interstate or export character. But where a delivery in course of an export shipment is made in aid of the shipment and under circumstances which insure the continuance of the journey and the delivery of the goods to their foreign destination, such a delivery is a mere step in the comprehensive purpose and continues the goods in their character of goods in process of exportation.

Counsel for defendant here admits that in the circumstances of this case "that plaintiff could actually export its [fol. 61] product without ever coming within the purview of this taxing statute. It could as consignor deliver to an exporting carrier oil consigned to New Zealand." This is almost identically what it did. All that is required of a ship in order that it preserve its character as export is that the consignment should be through some carrier which would insure the continuity of the export journey and delivery to the consignee at the port of destination. Could that be done more irrevocably than was done here? Here the oil was purchased by a foreign government for the use of its navy in New Zealand, the plaintiff consigned the oil to that government in New Zealand. Instead of employing another carrier the New Zealand government sent a vessel of its navy to Long Beach to receive the oil and to carry it to the destination to which it was consigned. In considering delivery in such cases the law is not concerned with the means of shipment. It is concerned solely with the question as to whether or not the means chosen guarantee the foreign delivery in good faith and according to the terms of a consignment to that destination. Can we say here that if plaintiff had delivered the oil to some form of public carrier, consigned to the New Zealand government, the sale would not have been local nor the tax have applied, but when it does exactly the same thing except that instead of using a public carrier it uses what should be a more dependible one in the shape of a naval vessel of the government which wanted the oil and sent the vessel here to take it to them, we should say that the sale was local and the [fol. 62] tax collectible? If we should refine in this way

we would find ourselves as was the State in Wisconsin vs. J. C. Penney Co., 85 Law Ed. 267, where if a tax was called by one name it would be unconstitutional while if called by another it would be valid. Should we not do as the Supreme Court did in that case and ask ourselves was the transaction in its entirety a sale for export; or did the New Zealand Government come here and make a local purchase of oil which it could thereafter do with as it saw fit, without any obligation to take the oil out of the State. It seems to me that the mere question of delivery is wholly indeterminative of the character of this transaction. The question is was this sale and purchase viewed in its entirety a sale and purchase for export and was the delivery of the oil on the naval vessel the end of the action, or was it a mere step in execution of a contract for export, a contract which was obviously intended as an export arrangement and one which was actually carried out.

The circumstances attending the sale, particularly the contract in pursuance of which the shipment is made is the determining factor.

The general intent of a manufacturer that an article is to be exported and his holding it for that purpose does not give to the article the protection of an export. Cornell vs. Coyle, 48 Law Edition 504: The owners state of mind in relation to the goods and his partial preparation to export them do not give such goods the protection of the Constitution. Coe vs. Errol, 29 Law Ed. 715. A bill of lading [fol. 63] does not control; the parties to a sale cannot "convert what was exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause" Superior Oil Co. vs. Mississippi, 74 Law Ed. 504: State Board of Equalization vs. Blind Bull Coal Co., 101 Pac. 2nd 70. Standard Oil Co. vs. Johnson, 57 A. C. A. 917-926. Unquestionably there can be a delivery preceding an export which concludes a sale and makes of it a local transaction. Countless cases may be cited to support this statement. Standard Oil Co. vs. Johnson, 132 Pac. 2nd 910, is a good example. But where there has been a *contract* of sale *for export* which comprehends an intermediate delivery, and where that delivery was part of the contract and in execution of it, it has always been held that the delivery, such as the one in this case, was merely a step in a completed export, the whole being within the protection of the Constitution. This is well ex-

pressed and illustrated by the case of Texas & N. O. R. Co. vs. Sabine Tram Co., 57 Law Ed. 442. In this case there was a shipment of lumber from an interior point in Texas to a Texas gulf port. It proceeded under a local bill of lading to a purchaser at the point of reshipment to a foreign port. On behalf of the party claiming the shipment to the gulf port to have been a local shipment in intrastate commerce, it was admitted "that there may be some additional or outside arrangement for a continuous final movement to a destination beyond that named in the bill of lading, or the bill of lading may itself note a forward continuous [fol. 64] movement beyond the destination named." It was insisted however that that movement must be unbroken under the original arrangement or shipment. They insisted that this could not be done where the original shipment was under a bill of lading consigning the lumber to a local purchaser at the port where the latter reshipped it to a European port; that the original shipper had no concern with what was done with the lumber after it reached the point to which he had billed it and where it was delivered to the person to whom he had sold it. The Court rejected this narrow contention, and measured the purchase and its transportation by all of the circumstances attending it, saying: "The determining circumstance is that the shipment of the lumber to Sabine (its first journey under a separate bill of lading) was but a step in its transportation to its real and ultimate destination in foreign countries. In other words the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation would be extremely artificial." Continuing the court say, which has special applicability to the case before us. "There must be transshipment at the seaboard; and if that may be the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character though it be essentially foreign." Texas vs. Sabine, 57 Law Ed. 442.

An illustrative case is Railroad Commission vs. Texas Ry. [fol. 65] Co., 57 Law Ed. 1215. There certain exporters in New Orleans made purchases of logs and staves in various sections of Louisiana. These were shipped to the purchaser, the shipments under the terms of the bills of lading, to terminate there. It was insisted by the appellant that,

to make the shipments exports, "there must be bills of lading and other means of connection between the railroads and the ocean carriers." But again the Court held that the circumstances of the sales determined their character. Stating that while the bills of lading provided for the delivery of the goods to the consignee at New Orleans, "the staves and logs were intended by the shippers to be exported to foreign countries, and were treated by both the shippers and the carriers accordingly." Citing cases, the court declared that in these cases there was a local shipment of freight which necessarily terminated at the seaboard. But it was decided that the character of the shipments and their continuity as a movement in foreign commerce did not terminate, nor was it affected by being tranported on local bills of lading. In the case before me there was no bill of lading but the defendant contends that there was a local transport through plaintiff's pipe line, which terminated at Long Beach with the delivery of the oil to the vessel Nucula. But as the case last cited states: "It was the essential character of the commerce, not the accident of local or through bills of lading which determines Federal or State control over it." Id. 57 Law Ed. 1215 p. 1219.

[fol. 66] In the often quoted case of Superior Oil Co. vs. Mississippi, 74 Law Ed. 504, where a sale was held to have been local it was stated that if there had been a certain agreement constituting the transaction interstate, it might have been made so. So in State Board of Equalization vs. Blind Bull Coal Co., 101 Pac. 2nd 70 where a sale was held to have been local the decision was based upon the fact the *contracts of sale* "did not involve any extrastate orders".

As pointed out however in McGoldrick vs. White, 85 Law Ed. 565, a contract of shipment does not necessarily change the nature of an interstate shipment nor affect the power of the state to deal with goods after they have reached their destination in that state. I have attempted no such application of the contract in this case. I have dwelt upon it and given it effect as showing the nature of the delivery made by plaintiff of its oil into the vessel at Long Beach and to show that that delivery was in pursuance of the contract of purchase, was in furtherance of it and that it was but a mere step in the execution of a genuine export transaction.

Under the rule of these cases the case before us affords a classic example of an export purchase and sale. The government of New Zealand required oil for the use of its

branch of the British Navy. Plaintiff in California offered to supply the oil, and as a result a sale was effected, the contract therefor being concluded in New Zealand. Under the terms of that contract the tender of plaintiff "for the supply of two cargoes * * * of oil fuel to the New [fol. 67] Zealand Division of the Royal Navy" was accepted by the representative of the New Zealand Government. Delivery of the oil was to be into "N. Z. Naval tank steamer R. F. A. Nucula, at Los Angeles, but this delivery was to be given to the order of the Naval Secretary, Naval Office, Wellington." The delivery of the oil involved in this case was made in pursuance of such an order. But that did not end plaintiff's connection with the resulting export. Under the terms of the contract plaintiff was still to make advances to the Master of the Nucula "up to £.300 to meet disbursements at the port of loading". Some of this advance must have had to be made as the oil flowed into the vessel, and some after it had all been so delivered as the amount of disbursements could not be known until the vessel was ready to depart from the port. Plaintiff was also required, after the oil had been loaded on the vessel to supply "bills of lading and other customary shipping documents" to the Master of the Nucula and to consign the oil "to the Naval Officer in charge, Auckland, New Zealand". Payment for the oil was not made at that time as appears from the fact that plaintiff was required to advance to the Master "up to £.300" which was to be repaid when the oil was to be paid for. Payment for the oil was later made "by the High Commissioner for New Zealand in London to the credit of the Richfield Oil Company, Los Angeles". It will be seen that plaintiff remained connected with the transaction until the oil was upon the seas, and that everything it did, including the pumping of the oil into the tanks of the vessel was in pursuance of a contract of export and in aid [fol. 68] and execution of it. The cases speak of the various acts involved in the total performance of a contract of export to be merely "steps" in its complete execution. Where a shipment has actually been made to a foreign country in pursuance of a plan to that effect "to give it a various character by the steps in its transportation would be extremely artificial". 57 Law Ed. 448.

The substantial identity of this case with Spaulding Brothers vs. Edwards, 67 Law Ed. 865, should be sufficient to support the conclusion reached herein. Defendant seeks to

distinguish that case however by saying that the delivery of the shipment therein was to a common carrier while in this case it was not. The rule is not absolute that delivery to a common carrier is essential to commit a shipment to export; it is enough that it is in process of export. The reason for the rule requiring delivery to a common carrier, where such a delivery is required, is that in that way the shipment is irrevocably consigned to its foreign destination; that there must be no danger as there would be in the case of a private person, that the export might be defeated by some fraudulent arrangement between the shipper and the person.

Here the oil was loaded upon a war vessel of a responsible foreign government, a vessel under the sole control of the power to which the oil was consigned. The chance that the oil was not as certain of delivery to its consignee as if it were on a common carrier, is not even speculation. As was said by Justice Holmes in the Spaulding case in dis- [fol. 69] cussing a similar question: "There was not the slightest probability of any such change and it did not occur". Another quotation from that eminent scholar who made simple every apparently involved question to which he addressed himself. In Superior Oil Co. vs. Mississippi, 74 Law Ed. 74, after holding in the circumstances of that case that a delivery to the purchaser left him with no obligation to finish an interstate transaction, Justice Holmes said: "Dramatic circumstances, such as a great universal stream of grain from the state of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here". In our case we have the dramatic circumstance of a sale to a great government and carriage by a warship, forbidding any doubt as to the prompt and direct delivery which was actually made.

Defendant contends that the appeal of the plaintiff here that its shipment could not legally be taxed is with reference to a matter which is not within the protection of the Constitution; that the Constitution only forbids imposts on exports which are directly addressed to exports and discriminate against them. The cases above hold that no tax can be imposed upon an export shipment while it is actually moving toward its destination. It seems clear however, that to accept defendants narrowest requisite, to levy a sales tax on an export while it is actually moving in transit is an

act which directly burdens the export contrary to the Constitution.

Defendants final contention is that the question at issue [fol. 70] here has just been decided by our Court of Appeal adversely to plaintiff in the case of Standard Oil Co. vs. Johnson, 132 Pac. 2nd, 910. The very able decision in that case contains a masterly analysis of the early and current decisions of our courts involving the taxation of goods claimed to have been entitled to the protection given by the Constitution to interstate commerce. But that decision is broadly distinguished from the case before us. In the first place the learned Presiding Justice who wrote that decision distinguished that case from the case of Spaulding Bros. vs. Edwards by saying that that case was one involving exports in which a different provision of the Constitution than that relating to interstate commerce applied. As the Spaulding case is essentially identical with the case before us, I might rest upon this distinction which was not only specifically made but is obviously correct. This distinction of the Spaulding case from cases involving interstate commerce was also made in Superior Oil Company vs. Mississippi, 74 Law Ed. 504 and State Board, etc. vs. Blind Bull Coal Co., 101 Pac. 2nd 70. I think this distinction is warranted.

With the improvement by means of transportation, the great speed of its movement and the volume of its activities, unless some of the earlier restrictions on taxation as burdening interstate shipments are relaxed vast quantities of property would escape taxation altogether. This does not apply to cases of export in anything like the same degree. See Sonneborn Bros. vs. Keeling 67 Law Ed. 1095. But [fol. 71] Standard Oil Co. vs. Johnson, 132 Pac. 2nd 910, can be clearly distinguished from the case before us on other grounds. In that case both parties to the contract of purchase and sale were doing business in California, the contract was made here. Immediately upon the execution of the contract, the purchaser Southern Pacific Company became entitled to have delivered to it the oil mentioned in the contract. The delivery was to be made from time to time upon the order of the purchaser, and at either one of two places as it might choose.

The oil was to be shipped to such point within the territorial activities of the purchaser as it should designate, but was to be delivered to itself and onto its own cars. The

Southern Pacific Company did business in several western states, including California and it could direct the shipment to be made to any one of these states. The shipment being delivered to them absolutely on their own cars operating over their own rails was subject to its control. It could have directed a shipment to be made to itself in New Mexico and after its receipt could have changed its purpose and held and used the oil in California.

The Motion of Plaintiff to amend its complaint to show the intention of the parties in the arrangement and execution of this contract will be denied.

Where there is no ambiguity in a writing the meaning of the writing must be determined from itself and what the parties to it did in its execution.

[fol. 72] The Judgment will be for the Plaintiff.

Dated: April 28, 1943.

Peter J. Shields, Judge.

ADDED COMMENT

Just as the foregoing opinion had been concluded the decision in the second case of Standard Oil Co. vs. Johnson, published in the April 16th issue of 57 A. C. A. 917 reached me. I think that the facts in that case sufficiently distinguish it from the case before me, but certain language used therein require an additional definition of difference.

In the first place the Standard Oil Company was complaining that it had been denied the protection of that provision of the Constitution reserving to Congress the sole power to regulate commerce between the States. Of this the Court says in this, its most recent decision, quoting from McGoldrick vs. Berwind, etc., 84 Law Ed. 565: "It is only when the tax operates to regulate commerce between the states or with foreign nations To An Extent Which Infringes the Authority Conferred Upon Congress, that the tax can be said to exceed constitutional limitations." Continuing its quotation from this same case it is said: "If as guides to decision we look to the purpose of the commerce clause to protect interstate commerce from discrimination or destructive state action, and at the same time to the purpose [fol. 73] of the state taxing power under which interstate commerce admittedly must bear its fair share of state tax

burdens, and to the necessity of judicial reconcil-ation of these competing demands, we can find no adequate ground for saying that the present tax is a regulation, *which in the absence of congressional action*, the commerce clause forbids". It will be noted from this language that it is not every regulation of commerce between the states that is invalid, it is only such as "infringes the authority conferred upon Congress" and that State taxes may "in the absence of congressional action" be enforced, which congress could have prohibited. But in the case of exports there is no absence of congressional action, or otherwise. The Constitution itself says that neither the congress nor the states shall have power to levy *any* impost upon exports. The prohibition is comprehensive and positive. The Plaintiff in the case before us claims the protection of that provision of the Constitution and it cannot be denied to it. The law is well setfled that after goods start upon their journey as exports and while they are actually moving as such, that they cannot be taxed. For Defendant to prevail in view of this state of the law it would have to establish that the sale here in question was not an export transaction. This it attempts to do by contending that plaintiffs part in the sale was to pipe its oil to Long Beach and deliver it to the New Zealand vessel sent there to receive it, and that then it was done, the sale completed and the tax matured. But we have seen that delivery by a local seller to one who buys [fol. 74] with a view to export does not necessarily constitute a local transaction. If the delivery was to a purchaser who was free after he received the goods to do with them as he saw fit, the fact that he intended to export them and actually did export them would not be enough to make the sale an export sale. But where the delivery of goods was made under a contract providing a plan of export which was actually carried out, insuring the delivery of the goods to their foreign destination, then delivery by the owner even though it may have passed his title has always been held to have been a part of the export and a step in its progress. Delivery to the foreign purchaser f.o.b. the port of shipment admittedly does not change the character of goods as export, nor does it interrupt the flow of the goods in their export movement. Can less be said of their like delivery to a foreign government on one of its warships under contract to transport the goods to a point in the foreign land

with particular reference to which the parties have contracted? In each of these cases the very act of delivery committed the goods irrevocably to the completion of their export journey. To treat them differently would be to create a distinction without a difference.

Other points of difference distinguish the Standard Oil case from the case before me. In that case the buyer and seller were each in California, the contract of sale was made here, the oil was delivered to the purchaser, in California, and paid for here. It was placed on the purchasers own [fol. 75] cars and billed at its direction and to a destination named by it. Thereafter the seller was entirely free of the transaction and the purchaser with its oil in its possession, in California, free to do with it as it saw fit. In the case under consideration the seller was in California and the purchaser in New Zealand; the contract of sale was made in New Zealand. Bids were asked for, to be submitted to the purchaser in New Zealand for oil "required by the New Zealand division of the Royal Navy", and plaintiffs bid was accepted "for the supply of two cargoes each of 65 tons * * * of fuel oil to" the purchaser, the oil to be delivered upon a vessel of the purchaser "and the oil consigned to the Naval Officer in Charge, Auckland, New Zealand." Plaintiff was to advance to the Master of the vessel sent to receive and transfer the oil a sum of money "up to £300" for expenses at the port while the oil was being loaded. Payment for the oil and repayment of the sums advanced for expenses was later to be made, to the credit of Plaintiff, in London. To call this transaction, so formally conducted, of so obvious a character and so evidently in such complete good faith, a mere local purchase at Long Beach, would be a purely arbitrary pronouncement.

Plaintiffs position might be made clearer if stated in another way. There was a party in New Zealand which wanted oil for use there. A party in California was found which had oil for sale. A contract was made between them by which the oil was to be transported from California to New Zealand through which the party here who wanted to sell its [fol. 76] oil was enabled to sell it to the New Zealand party which wanted to purchase it. A plan was made by which this purpose was effected, and the *export* of the oil by the California party was completed. Can we call it by any other name than export?

Admitting that the New Zealand party arranged to purchase the oil here it was purchased as part of a plan to get the oil from here to New Zealand. Every portion of the contract was made with a view to effecting that purpose. As a result of the execution of the contract the oil began to move from California and it continued to move in an uninterrupted progress from here to New Zealand. An export was actually effected through the cooperation of successive acts, every one of which, including the delivery of the oil by the California owner, was a part of its execution. It can't be said that an act which was so essential to an export was not a part of it. I can't say it better than it was said in the Sabine case, 57 Law Ed. 442, 448 "There must be a transshipment at the seaboard; (in the instant case Long Beach) and if that may be made the point of ultimate destination by the devise of separate bills of lading, the commerce will be given local character though it be essentially foreign."

I can see no conflict between the conclusion reached in this case, as above and the Standard oil case, and that conclusion is adhered to.

P. J. S., Judge.

[File endorsement omitted.]

[fol. 77] In Superior Court of Sacramento County

Findings of Fact and Conclusions of Law—Filed May 24, 1943

The above entitled action came on regularly for hearing before the Honorable Peter J. Shields, Judge, a jury trial having been expressly waived by the respective parties. The plaintiff appeared by Norman S. Sterry, Esquire, of the firm of Gibson, Dunn & Crutcher, counsel for the said plaintiff, and the defendant by Adrian A. Kragen, Esquire, Deputy Attorney General of the State of California, counsel for the said defendant. Plaintiff introduced in evidence two stipulations of fact with documentary evidence attached thereto. The defendant offering no evidence, the cause was submitted to the court upon the pleadings and the said stipulations, and being closed, argued and submitted to the

court, and the court having carefully considered the matter and being fully advised in the premises, makes the following

FINDINGS OF FACT

I

All of the allegations of Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X, of the Complaint are true.

II

That the invitation for bids alleged in Paragraph VI of the said Complaint was issued by the New Zealand Government Stores Control Board, hereinafter referred to as "Control Board", at Wellington, New Zealand, on or about the 3rd day of December, 1936, and was in words and figures as follows:

[fol. 78] "New Zealand Government Stores Control Board

Tender Schedule No. 28—Oil Fuel for N. Z. Division of the Royal Navy

"Tenders are invited for the supply of one cargo of 6,500 tons (approx.) of oil fuel required by the New Zealand Division of the Royal Navy for delivery f.o.b. N. Z. Government tank steamer at any port beyond New Zealand specified by the tenderer. Delivery to be taken about the middle of March, 1937.

Alternative tenders are required for payment as under:

(1). Net cash, Wellington, New Zealand.

(2). Net cash, London, England.

Conditions of Tender:

1. Tenders must be in writing and must be enclosed in a sealed envelope, marked on the outside 'Tender for Fuel Oil', and must reach the Secretary, New Zealand Government Stores Control Board, Wellington, not later than 4 p. m. on Tuesday, 12th January, 1937.

Tenders must hold good for 30 days.

2. The oil fuel must be in accordance with Specification S. C. B. 28/1 attached.

3. Tenderers must state the specific gravity of the oil offered.

4. No advertisement relative to the acceptance of this tender shall be published in any newspaper, journal or other advertising medium unless such advertisement has first been submitted to and approved by the New Zealand Government Stores Control Board.

[fol. 79] 5. The lowest or any tender will not necessarily be accepted.

P. Glenn, Secretary.

Wellington,

3rd December, 1936."

III

That as alleged in Paragraph VI of said Complaint, Hodder & Tolley, Ltd., acting as agents of William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California, sometimes hereinafter referred to as "plaintiff's predecessor in interest", transmitted said bid to said William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California, as alleged in said Paragraph VI. That after the submission by Hodder & Tolley, Ltd., as agents of plaintiff's predecessor in interest of the bid of said plaintiff's predecessor in interest, the Control Board requested Hodder & Tolley, Ltd. to ascertain if the bid could be understood as submitted for one or two cargoes of oil at the option of the said Control Board. That plaintiff's predecessor in interest by cable authorized the said Hodder & Tolley, Ltd. to advise the said Control Board that said bid could be accepted by said Control Board at its option for one or two cargoes of fuel oil of approximately 6,500 tons each, and said Hodder & Tolley, Ltd. did so notify the said Control Board; and thereafter, the said Control Board elected to accept the [fol. 80] said bid for two cargoes of fuel oil and, as alleged in Paragraph VI of said Complaint, executed and delivered to Hodder & Tolley, Ltd., as agents of said plaintiff's predecessor in interest, a written contract or agreement,

referred to in Paragraph VI of the said complaint in words and figures as follows:

"S. C. B. 5/10/2.
N. Z. Govt. Stores Control Board,
Wellington, N. Z.
4th February, 1937.

"Messrs. Hodder & Tolley, Ltd., Box 135, Palmerston North.

GENTLEMAN,

I am directed to advise that your tender dated 13th January, 1937, is accepted for the supply of two cargoes each of 6500 tons (approx) of oil fuel to the New Zealand Division of the Royal Navy, subject to the following conditions:

(1) Price 24/8.4 per ton of 2240 lbs. Fob Los Angeles, payment in London, with conversion at $4.90 to £ any variation at date of payment to be to the account of the Naval Department.

(2) Payment shall be made by the High Commissioner for New Zealand in London to the credit of the Richfield Oil Co., Los Angeles, at Barclay's Bank, Chief Foreign Branch, London.

(3) Delivery shall be given to the order of the Naval Secretary, Navy Office, Wellington, into N. Z. Naval tank steamer R. F. A. "Nucula" at Los Angeles, California. [fol 81] Delivery of the first cargo shall be given on or about the 15th March, 1937, and of the second cargo on or about the 21st May, 1937, or as at such other time as may be mutually agreed upon.

(4) The oil supplied shall conform in all respects to the specification copy of which is attached. Note: It is particularly desired that the hard asphalt content be as low as possible and not more than 2%.

(5) The oil shall be inspected by Messrs. Charles Martin & Co. at a cost of two cents per ton.

(6) The Master of the "Nucula" shall wireless the Richfield Oil Co. when seven days and also when 24 hours out from Los Angeles.

(7) The Richfield Oil Co. shall advance to the Master of the "Nucula" at Los Angeles a sum in dollars the equivalent of up to £300 to meet disbursements at port of loading on each trip, such advance to be repaid when payment is made for the fuel oil.

(8) Bills of Lading and other customary shipping documents shall be handed to the Master of the "Nucula" and the oil consigned to the Naval-Officer-In-Charge, Auckland, New Zealand.

(9) Should there be any breach of these conditions on the part of the contractors or their authorized agents this agreement may be summarily determined by the Accounting Officer of the N. Z. Naval Tank steamer present for the purpose of accepting delivery of the fuel oil at the port of [fol. 82] delivery, giving notice in writing to that effect to the contractor's agents, or by the Naval Secretary at Wellington giving notice in a like manner to the contractors at their registered office at Wellington, New Zealand.

(10) No advertisement relative to the contract shall be published in any newspaper, Magazine, journal or other advertising medium unless such advertisement has first been submitted to and approved by the Stores Control Board.

Please confirm by signing the attached duplicate of this agreement and returning to me at your earliest convenience.

Yours faithfully, Secretary."

"New Zealand Government Stores Control Board

Specification S. C. B. 28/1—Oil Fuel for the New Zealand Division of the Royal Navy

Flash Point: Not to be lower than 175° F. as obtained by the Pensky-Marten close test.

Sulphur: Not to exceed 1.5%.

Acidity: The oil fuel supplied shall be free from inorganic acidity and as free as possible from organic acidity.

Water: Not to exceed 0.5%.

[fol. 83] Viscosity: Not to exceed 1,000 seconds for an outflow of 50 cubic centimeters at a temperature of 32° F., as determined by Redwood's Standard Viscometer No. 11 (Admiralty type for testing oil fuels).

Notwithstanding that the maximum viscosity allowed by the general specification is 1,000 seconds at 32° F. the actual

warranty or condition of contract will be the figure guaranteed by the firm tendering.

Calorific Value: Not less than 18,400 B. T. U.'s per lb.

Specific Gravity: 0.89 to .946 at 60° F. (Approximately .94 preferred).

Impurities: The oil shall be free from earthy, carbonaceous or fibrous matter or other impurities which are likely to choke the burners.

Note: In the case of Persian Oil Fuel the viscosity is not to exceed 1000 seconds at 40° F. and a bottle test is to be carried out as follows:

About 200 mls. of the sample as received are filtered at laboratory temperature through 36 mesh wire gauze and placed in a pint bottle of 2¾ ins. internal diameter. The bottle is then carefully packed in melting ice in an ice [fol. 84] chest in such a manner that the oil is maintained at 32° F. for a period of at least 16 hours and not more than 24 hours. The bottle is then removed and gently inverted. If the oil is wholly or partially set, the bottle is shaken for not more than 5 seconds. The oil when subjected to the 'Bottle' test must either:

(a) Flow as a uniform liquid or

(b) If partially or wholly set flow as a uniform liquid when shaken as above. The sulphur content is not to exceed 3%.

Wellington,

3rd December, 1936."

IV

That the said contract or agreement above set forth was received by said Hodder & Tolley, Ltd., as agents of plaintiff's said predecessor in interest, at Palmerston, New Zealand, and upon its receipt, said Hodder & Tolley, Ltd. as agents in New Zealand for William C. McDuffie acting as Reorganization Trustee of Richfield Oil Company of California, executed a duplicate of said contract or agreement and delivered the same to the Control Board at Wellington, New Zealand.

V

That pursuant to said contract or agreement, the said Control Board dispatched the New Zealand Naval Tank

Steamer R. F. A. "Nucula" to plaintiff's Marine Terminal, Long Beach, California, and the first cargo of fuel oil was [fol. 85] delivered to the said R. F. A. "Nucula" on or about the 15th day of March, 1937, at said Marine Terminal, Long Beach, California, and was transported by said R. F. A. "Nucula" to Auckland, New Zealand, and thereupon the said R. F. A. "Nucula" returned to said Marine Terminal, Long Beach, California, for the second cargo; that said second cargo on which the tax sought to be recovered in this action was levied, was delivered by the plaintiff to the said R. F. A. "Nucula" on or about the 14th day of May, 1937, as alleged in Paragraph VI of said Complaint. That the shipment of the first cargo of fuel oil delivered as hereinbefore found to the said R. F. A. "Nucula" on or about the 15th day of March, 1937, was handled and payment for it made in substantially the same manner as alleged in Paragraph VI of the said complaint with reference to the second shipment. Payments for the said shipments were made to plaintiff's agent in London.

VI

That at all times mentioned in the complaint, the refinery of plaintiff and its predecessor in interest was located at Watson, California, about midway between the City of Los Angeles and plaintiff's Marine Terminal at Long Beach, California. That at all times mentioned in the Complaint, plaintiff and its predecessor in interest maintained storage tanks at its Marine Terminal, connected with the refinery tanks of plaintiff and its predecessor in interest at Watson, by a pipe line.

[fol. 86]

VII

That at the time of the trial plaintiff did not have a record of any message from the Master of the R. F. A. "Nucula" on either voyage other than those required by the contract, but it was customary for the tankers approaching port after first wirelessing their position to keep the shipper advised of the daily progress.

VIII

That as to each cargo, when the plaintiff was advised that the "Nucula" was between twenty-four and forty-eight hours from Marine Terminal, Long Beach, the plaintiff

started pumping oil from its refinery tanks at Watson to its storage tanks at Marine Terminal, and continued pumping until the entire cargo had been pumped into the storage tanks. As soon as the "Nucula" docked and was ready to receive the oil, the said oil was pumped from the storage tanks into the "Nucula." At the time of trial there were no records available to show as to either trip of the "Nucula" whether the "Nucula" was ready to receive the oil before the entire cargo had been pumped into the storage tanks, but on neither occasion was the oil held in the storage tanks more than twenty-four to thirty-six hours before the plaintiff started pumping it from the storage tanks into the "Nucula." That after the pumping of said oil from the storage tanks into the "Nucula" started, it was continued without interruption until the entire cargo was delivered into the tanks of the "Nucula."

[fol. 87] IX

That the export declaration executed by the plaintiff's predecessor in interest, as alleged in Paragraph VI of the Complaint, was in words and figures as follows:

UNITED STATES CUSTOMS SERVICE

Read carefully the instructions on back to avoid delay at shipping point.

SHIPPER'S EXPORT DECLARATION
OF SHIPMENTS TO FOREIGN COUNTRIES OR NONCONTIGUOUS TERRITORIES OF THE U. S.

Clearance will not be granted until shipper's declaration has been filed with the Collector of Customs.

(Declarations should be typewritten or prepared in ink; pencil is not permissible.)

Form 7525

United States Department of Commerce, Bureau of Foreign and Domestic Commerce, Regulations, Federal Register, June 2 and August 31, 1938.

File No. ——, Section Customs Statistics.

This space for use of Customs.

Customs File No. ——, Statistical Code Nos. ——. District ——. Port ——. Flag ——. Country ——.

Goods shipped by Richfield Oil Corporation.

(Name of actual shipper) If shipped by Agent, insert name and address of principal, seller, or consignor on second line below.

Address (Number) 555 (Street) South Flower Street, (City) Los Angeles, (State) California.

Shipment invoiced by Richfield Oil Corporation.

(If shipped by Agent, insert name and address of principal, seller, or consignor.)

[fol. 88] For shipment on the New Zealand Navy Tanker "Nucula".

(Name of carrier. If vessel, give name and nationality.)

From Long Beach, Calif.

(U. S. Customs port of exportation.)

To final country of destination Auckland, New Zealand.

(Not country where transshipped) (City) (Country)

(Here follows 1 photolithograph, side folio 89.)

Marks and numbers	Number and kind of packages	DESCRIPTION OF GOODS Describe each kind of goods in detail. Do not use general terms such as meats, dry goods, machinery, fruits, etc. (See instructions on back, Par. 3)	Net quantity in pounds, long tons (of 2,240 pounds) gallons, yards, bushels, barrels, etc., as required by Schedule B	VALUE AT TIME AND PLACE OF EXPORT U.S. Products, including foreign goods altered or remanufactured in the United States	Foreign products in same condition as imported	Statistical Class No., Schedule B
			Barrels	Nearest whole dollars	(no cents nor ciphers)	
NIL	In Bulk	Fuel Oil	43,757	$39,381		5031

Waybill or manifest No._____

May 15, 1937
(Date of exportation)

Total $39,381

[fol. 90] I authorize —— to act as my agent for customs purposes.

—— ——, Shipper.

I declare that the above is a true account of merchandise shipped to the country named; and that the description and quantity of each article are truly stated at the selling price or market value at time and place of exportation.

Sworn and subscribed to before me on —— ——, 19— —— —— (Title or Designation), (Authorized to adminster oaths under Sec. 486, Tariff Act of 1930.)

(Signature) B. D. Clanchard, (Capacity) Agent (Member of firm, secretary, agent, etc.), (Address) 555 So. Flower St., Los Angeles, California.

Instructions

Follow carefully to avoid delay at shipping point.

1. Provisions of Law (Secs. 4197 and 4200, Rev. Stat. U. S., and Sec. 1, Act March 3, 1893.)

(a) Vessels shall not be cleared for foreign ports until manifests (or declarations) verified by oath, of the cargo, or its parts, have been delivered to the collector by the owners, shippers, or consignors thereof.

[fol. 91] (b) Leaving without clearance subject to a penalty of $500.00.

(c) Similar provisions apply to exportations by rail, vehicle, or ferry.

(d) Declarations should give total quantities and values for each kind of article.

The final city and country of destination, to which the goods are sold, should be given for goods shipped through the Panama Canal Zone, Canada, Great Britain, or other seaboard countries for transshipment to ultimate countries of destination, such as through Chile or Peru, destined to Bolivia.

2. Declarations.

(a) Must be made in duplicate for all merchandise shipped to foreign countries or to and from noncontiguous

territories of the United States, with the exception of bonded shipments in transit through the United States. (A copy of this Declaration is acceptable in various foreign countries to meet certain of their entry requirements. Therefore, on shipments to those countries, the Declaration may be submitted in triplicate. This list of countries includes Canada, Estonia, Haiti, and Panama. A third copy of this Declaration, when certified by a United States customs officer, is accepted by the customs authorities of Yugoslavia, in lieu of a certificate of origin.)

(b) Both original and duplicate must be signed. The [fol. 92] original covering shipment by vessel valued at more than $100 must be verified by oath before a notary public, customs officer, or other person authorized to administer oaths. Oath is not required on declaration covering shipment to Canada or Mexico by car, vehicle, or ferry.

(c) Agent's authority must be in writing on declaration or other document filed with the collector. Declarations are treated as confidential.

(d) Declarations must be presented to the Collector of Customs, who will retain the original and certify the duplicate for presentation by shipper to the transportation company, to be attached to outward vessel or car manifest.

(e) When shipments are made from the interior on through bills of lading to foreign destination, declarations in duplicate must accompany waybills (if preferred, in sealed envelope) to port of exportation.

(f) On local bills of lading, declarations may accompany the goods, or be mailed to consignee at seaboard.

(g) Separate declarations should be prepared for each car load.

3. Description of Articles.

(a) Must be definite and complete. Trade-mark names and general terms, such as "dry goods", "groceries", "meats", etc., are not sufficient. The total quantity and value of each class of articles should be stated in one item.

(b) Quantities must be expressed in unit measures of pounds, tons (of 2,240 pounds), yards, gallons, etc., as re- [fol. 93] quired by Schedule B.

(c) Values (the selling price or actual market value at time and place of exportation) for all articles grown, produced, or manufactured in the United States, must be stated in the column "U. S. Products."

(d) Values of articles of foreign origin, reexported in same condition as imported, must be stated in the column "Foreign Products." Foreign articles changed by alteration or manufacture become "U. S. Products."

(e) Certificates of inspection by the Department of Agriculture, for exports of cheese, oleomargarine, butter, meats, and other food products must be furnished when required.

4. Schedules and Blanks.

(a) Schedule B, statistical classification of exports, may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D. C., or from the District Offices of the Bureau of Foreign and Domestic Commerce, located in principal cities, or Collectors of Customs.

(b) Shipper's Export Declarations may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D. C., or from Collectors of Customs for 30 cents per block of 100. They may be printed by private parties provided they conform to the official form in size, wording, color, and arrangement.

X

[fol. 94] That the Bill of Lading executed by the Master of the R. F. A. "Nucula," as alleged in said Paragraph VI of the Complaint was in words and figures as follows:

Richfield Oil Corporation, 555 South Flower Street, Los Angeles, Cal.

Shipped in apparent good order and condition by Richfield Oil Corporation on board the British Steamship called the R. F. A. Nucula whereof G. Atwood is master, now lying in the Port of Long Beach, California, and bound for Auckland, New Zealand, to say 43,756.85 bbls., of 42 U. S. Measured Gallons; Fuel Oil in bulk at 60° F., equivalent to 6,419.95 Long Tons of 2240 lbs. to be delivered at the Port

of Auckland, New Zealand, or so near thereto as she can safely get always afloat unto Naval Officer in Charge, Auckland, New Zealand, or to his or their assigns, he or they paying freight at the rate of as agreed.

Contents, quality, weight and *guage* unknown.

Not responsible for leakage or deterioration of quality.—General Average Payable according to York-Antwerp Rules of 1924, and as to matters not therein provided for, according to usages and customs of the port of San Francisco. In case a General Average Statement to be required, the same to be adjusted at San Francisco by adjusters to be appointed by the Owners, who are to attend to the settlement and collection of the average, subject to customary charges. Should the vessel put into a port of distress or be under [fol. 95] average, she is to be consigned to Owner's Agents, paying them the usual charges and commissions.

It is mutually agreed that the Ship shall have liberty to sail without pilots; to tow and assist vessels in all situations; to deviate for the purpose of saving life or property; that the carrier shall have liberty to convey goods in lighters to and from the ship at the risk of the owner of the goods, and, in case the ship shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to transship the goods to their destination by any other steamship.

It is also mutually agreed, that the Carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea or other waters, by fire from any cause wheresoever occurring; by barratry of the master or crew, by enemies, pirates, or robbers, by arrest and restraint of princes, rulers or people, riots, strikes, or stoppage of labor; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, by collisions, stranding, or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default or error in judgment of the pilot, master, marines, or other servants of the ship owner, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them or

by the Ship's Husband or Manager); nor for the heat-
[fol. 96] ing, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for land damage; nor for the obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk, or transshipment; nor for any loss or damage caused by the prolongation of the voyage.

It is mutually agreed that if due diligence shall have been exercised to make the vessel in all respects seaworthy and to have her properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster, resulting from accident, or faults or errors in navigation, or in the management of the vessel, or from any latent defect in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees or owners of the cargo shall, nevertheless, pay salvage and any special charges incurred in respect of the cargo, and shall contribute in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force
[fol. 97] and effect, and to the same extent, as if such danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the vessel, or any latent defect or unseaworthiness.

1. It is also mutually agreed that the Carrier shall not be liable for Gold, Silver, Bullion, Specie, Documents, Jewelry, Pictures, Embrioderies, Works of Art, Silks, Furs, China, Porcelain, Watches, Clocks or for goods of any description which are above the value of $500 per package, unless Bills of Lading are signed therefor, with the value therein expressed, and a special agreement is made.

2. Also, that shippers shall be liable for any loss or damage to ship or Cargo caused by inflammable,

explosive or dangerous goods, shipped without full disclosure of their nature, whether such Shipper be Principal or Agent, and such goods may be thrown overboard or destroyed at any time without compensation.

3. Also, that the Carrier shall have a lien on the goods for all fines or damages which the ship or cargo may incur or suffer by reason of the incorrect or insufficient marking of packages or description of their contents.

4. Also, that in case the ship shall be prevented from reaching her destination by Quarantine, the Carrier may discharge the goods into any Depot or Lazaretto, and such discharge shall be deemed a final delivery [fol. 98] under this contract, and all the expenses thereby incurred on the goods shall be a lien thereon.

5. Also, that if the goods be not taken by the consignee within such time as is provided by the regulation of the port of discharge, they may be stored, by the Carrier, at the expense and risk of their owners.

6. Also, that full freight is payable on damaged goods, but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

7. Also, freight is to be considered as earned upon shipment and is to be retained by the ship owners, vessel or cargo lost or not lost.

8. Also, the owner shall have a lien on the cargo for all freight, hire, advances, charges, dead freight, demurrage, cost of recovering same, taxes, duties and fines, which may be incurred or sustained or be imposed upon it, and all expenses to owner resulting from any errors or onmissions of charterer. Dues and other charges upon the cargo shall be paid by charterer, and dues and other charges upon the vessel shall be paid by owner.

9. Also, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the Carrier shall be entitled to recover the difference from the shipper.

10. Also, that in the event of claims for short delivery [fol. 99] when the ship reaches her destination, the price shall be the market price at the port of destination on the day of the Ship's entry at the Custom House, less all charges saved.

11. All conditions and exceptions contained in Charter Party dated —— —— are hereby made a part of this bill of lading.

And finally, in accepting this Bill of Lading, the Shipper, the Owner, and Consignee of the goods and the holder of the Bill of Lading, agree to be bound by all of its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such Shipper, Owner, Consignee or Holder.

In witness whereof, the Master or Agent of the said Ship hath affirmed to three Bills of Lading all of this tenor and date numbered consecutively, one of which being accomplished, the others to stand void.

It is also mutually agreed that shipment made hereunder is subject to all of the provisions of Sections 4281, 4282 and 4283 of the Revised Statutes of the United States and the amendments thereto, and of Section 3 of the Act of Congress of the United States, approved February 13, 1893, and entitled "An Act Relating to the Navigation of Vessels," etc.

Dated in Long Beach, Calif. this 14th day of May, 1937.

(Signed) Geo. Atwood, G. Atwood, Master.

[fol. 100]

XI

That the tax sued for in this case of $1,514.78 was levied by the defendant Board upon the gross receipts from the sale of said second cargo of oil delivered to the said "Nucula" on or about the 14th day of May, 1937, as hereinbefore found.

XII

That it is not true, as alleged in Paragraphs II and III of the Answer, that the said tax was not with respect to an export sale but, on the contrary, the sale of said oil constituted an export sale, and from the inception of negotiations it was contemplated by all parties thereto that said

oil would be exported from California to New Zealand, and said oil was exported and conveyed by the said "Nucula" from California to New Zealand.

XIII

That all acts of the plaintiff herein, including the delivery of the oil into the tanks of the R. F. A. "Nucula", were in pursuance of a contract made between the plaintiff's predecessor in interest and the New Zealand Government Stores Control Board for the exportation of oil from California to New Zealand, and the delivery of the oil to the R. F. A. "Nucula" was a mere step in aid and execution of the said contract for the exportation of oil and for its said exportation.

XIV

That the denials of Paragraphs IV and V of the defend-[fol. 101] ant's Answer are not true.

From the foregoing Findings of Fact, the court makes the following

Conclusions of Law

I

That the sale and delivery of the said oil to the R. F. A. "Nucula" constituted and was an export sale of the said oil within the meaning of Article I, Sections 9 and 10, of the Constitution of the United States.

II

That the said sale of oil by the specific provisions of the California Retail Sales Tax Act was exempt from any tax provided in said Act.

III

That all acts of the plaintiff herein, including the delivery of the oil into the tanks of the R. F. A. "Nucula", was in pursuance of a contract made between the plaintiff's predecessor in interest and the New Zealand Government Stores Control Board for the exportation of oil from California to New Zealand, and the delivery of the oil to the R. F. A. "Nucula" was a mere step in aid and execution of the said contract for the exportation of oil and for its said exportation.

IV

That if the said California Retail Sales Tax Act as amended be construed, applied or enforced in such manner [fol. 102] as to impose a tax upon said sale of fuel oil hereinbefore described, said Act is invalid, illegal and unenforcible, in that it is contrary to and in violation of the provisions of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the Constitution of the United States.

V

That the plaintiff is entitled to recover the sum of $1514.78, together with interest thereon at the rate of seven percent. per annum from and after the 7th day of July, 1942.

Done in open court this 24th day of May, 1943.

Peter J. Shields, Judge of the Superior Court.

[File endorsement omitted].

[fol. 103] In Superior Court of Sacramento County

Judgment—Filed May 24, 1943

The above entitled action came on regularly for hearing before the Honorable Peter J. Shields, Judge, a jury trial having been expressly waived by the respective parties. The plaintiff appeared by Norman S. Sterry, Esquire, of the firm of Gibson, Dunn & Crutcher, counsel for the said plaintiff, and the defendant by Adrian A. Kragen, Esquire, Deputy Attorney General, of the State of California, counsel for the said defendant. Plaintiff introduced in evidence two stipulations of fact with documentary evidence attached thereto. The defendant offering no evidence, the cause was submitted to the court upon the pleadings and the said stipulations, and being closed, argued and submitted to the court, and the court having made and entered its written Findings of Fact and Conclusions of Law wherein and whereby it found that the plaintiff was entitled to have and recover from the defendant the sum of $1,514.78,

Now, therefore, by virtue of the premises and the law,

It is ordered, adjudged and decreed that the plaintiff do have and recover of and from the defendant the sum of

$1,514.78, together with interest thereon at the rate of seven percent per annum from the 7th day of July, 1942.

Done in open court this 24th day of May, 1943.

Peter J. Shields, Judge of the Superior Court.

[fol. 104] Attest: T. F. Patterson, Clerk, By Wm. Hickey, Deputy Clerk. (Seal).

[File endorsement omitted.]

Endorsed: "No, 65798. Judg't Entered May 25, 1943, in Judgment Book 93, Page 92 at 11:15 o'clock a.m. Judgment Roll Filed May 25, 1943. T. F. Patterson, Clerk, By James L. Kerins, Deputy."

IN SUPERIOR COURT OF SACRAMENTO COUNTY

STIPULATION AMENDING STIPULATION OF FACTS—Filed July 17, 1943

Whereas judgment has been entered in favor of the plaintiff, and

Whereas the defendant contemplates taking an appeal therefrom, and

Whereas defendant desires to support such appeal by the judgment roll alone except for the fact the defendant desires the record to show the evidence introduced upon the averments of Paragraph VII of the complaint, which averments are found to be true in Finding I,

Now, therefore, it is stipulated by and between the parties [fol. 105] hereto:

That paragraph (5) of the original stipulation read as follows:

> "(5) It Is Further Stipulated, subject to the competency, relevancy and materiality of the facts herein stipulated to, that if the plaintiff were to produce as witnesses the said Wm. C. McDuffie, and the proper servants, agents, officers and employees of Wm. C. McDuffie, acting as Reorganization Trustee of Richfield Oil Company of California, of Hodder & Tolley, Ltd., of the plaintiff Richfield Oil Corporation, of the said Control Board and of the New Zealand Division of the Royal Navy, that each of said witnesses would

testify to the truth of the facts alleged in paragraph VII of the complaint on file herein.

The defendant, while stipulating that said witnesses, if called, would so testify, does not believe that such testimony would be competent, relevant or material, and specifically reserves the right to object to the introduction of paragraph (5) on the ground that the facts to which it is stipulated the witnesses would testify are not competent, relevant or material; and it is specifically agreed that the defendant shall have the same right to so object to the introduction of said paragraph (5) as it would if any of the said witnesses were personally present and testifying on the stand."

[fol. 106] It Is Further Stipulated that at the time of the trial the said paragraph (5) was offered in evidence; that it was objected to by the defendant upon the ground it was incompetent, irrelevant and immaterial, and that the intentions of the parties were to be gained from their acts and conduct and could not be shown by parol testimony at the trial; which said objection was sustained by the court and the said evidence excluded, and none of the persons mentioned in said paragraph (5) was called or offered as witnesses, or testified upon the subject matter covered in paragraph (5) and the finding of the court as to the truth of the averments of paragraph VII of the Complaint was based upon the other facts found by the court, including the conduct of the parties, as set out in the Findings.

It Is Further Stipulated and Agreed that this stipulation may be deemed to be a part of the record on appeal and be considered as part of the judgment roll.

Dated July 14, 1943.

Robert E. Paradise, Norman S. Sterry, Gibson, Dunn & Crutcher, by Norman S. Sterry, Attorneys for Plaintiff; Robert W. Kenny, Attorney General; H. H. Linney, Assistant Attorney General; Adrian A. Kragen, Deputy Attorney General, by Adrian A. Kragen, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 107] IN SUPERIOR COURT OF SACRAMENTO COUNTY

NOTICE OF APPEAL—Filed July 17, 1943

To the Honorable Peter J. Shields, Judge of the above entitled Superior Court and to Robert E. Paradise, Norman S. Sterry and Messrs. Gibson, Dunn and Crutcher, attorneys for plaintiff:

You Will Please Take Notice that defendant in the above entitled action hereby appeals to the Supreme Court of the State of California from the judgment in favor of plaintiff and against defendant herein made and entered on the 25th day of May, 1943, and contained in Judgment Docket 93, at page 92 thereof, and from the whole of said judgment.

Dated: July 16, 1943.

Robert W. Kenny, Attorney General of the State of California; H. H. Linney, Assistant; Adrian A. Kragen, Deputy, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 108] IN SUPERIOR COURT OF SACRAMENTO COUNTY

NOTICE TO PREPARE TRANSCRIPT—Filed July 17, 1943

(Title of Court and Cause)

To Honorable T. F. Patterson, Clerk of the above entitled court:

Your Are Hereby Instructed to prepare the clerk's transcript in the above entitled cause, on appeal to the Supreme Court of the State of California, and to include therein the judgment roll in said cause, the stipulation dated July 14, 1943 relating to Paragraph VII of the complaint, the written opinion rendered by Judge Peter J. Shields, the notice of appeal and this notice to prepare clerk's transcript.

Dated: July 16, 1943.

Robert W. Kenny, Attorney General of the State of California; H. H. Linney, Assistant; Adrian A. Kragen, Deputy, Attorneys for Defendant.

AFFIDAVIT OF SERVICE BY MAIL

SACRAMENTO SUPERIOR COURT

No. 65798

RICHFIELD OIL CORPORATION, Plaintiff,

vs.

STATE BOARD OF EQUALIZATION, Defendant

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

The undersigned, being duly sworn, says: I am a citizen of the United States, over the age of eighteen years, a [fol. 109] resident of the City and County of San Francisco, State of California, and not a party to the above entitled action; Norman S. Sterry, the attorney of record of the above-named Plaintiff maintains an office at 634 South Spring Street in Los Angeles, County of Los Angeles, State of California; and between said two places there is a regular communication by mail; on the 16th day of July, 1943, I served a true copy of the Notice of Appeal and Notice to Prepare Transcript herein, to the original of which this affidavit is attached, on said last-named attorney of record, by depositing said copy on said date in the post office at the said City and County of San Francisco, enclosed in a sealed envelope addressed to said attorney at the office thereof, and prepaying the postage thereon.

Helen Monat.

Subscribed and sworn to before me this 16th day of July, 1943. Adrian A. Kragen, Deputy Attorney General.

[File endorsement omitted.]

[fol. 110] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 111] IN SUPREME COURT OF CALIFORNIA

RICHFIELD OIL CORPORATION, a Corporation, Plaintiff & Respondent,

vs.

STATE BOARD OF EQUALIZATION, Defendant & Appellant

ENTRIES IN REGISTER OF ACTIONS

Sept. 28, 1943. Filed Clerk's Transcript on appeal from Judgment.

Nov. 23, 1943. Filed Appellant's Opening Brief.

Jan. 26, 1944. Filed Respondent's Brief.

Apr. 13, 1944. Filed Appellant's Reply Brief.

May 12, 1944. Cause called and argued. Stipulated that any justice pro tem who may be assigned may participate in the decision. Respondent granted permission to print and file his oral argument. Respondent 15 days for additional brief, appellant 15 days to reply. Court to decide upon date of submission.

May 31, 1944. Filed Oral Argument of Norman S. Sterry for Respondent.

June 21, 1944. Filed Appellant's reply to oral argument of respondent.

Dec. 30, 1944. The judgment is affirmed.

Gibson, C. J.

We Concur.

Curtis, J.; Shenk, J.; Schauer, J.; Edmonds, J. (Traynor, J., did not participate herein.)

I dissent.

Carter, J.

Jan. 15, 1945. Filed Appellant's petition for rehearing.

Jan. 29, 1945. Rehearing Granted.

Mar. 5, 1945. Cause called and argued. Traynor, J., being disqualified retired from the bench. Stipulated any [fol. 112] justice pro tem may participate in decision. Respondent granted 20 days to file copy of oral argument and additional authorities; Appellant 20 days to reply thereto. Cause thereafter to be submitted.

Mar. 23, 1945. Filed oral argument of Norman S. Sterry for Respondent.

Mar. 23, 1945. Filed Supp. to oral argument of Norman S. Sterry.

Apr. 27, 1945. Filed Appellant's final brief.

Nov. 1, 1945. The judgment is reversed.

Carter, J.

We concur.

Peters, J., pro tem; Shenk, J.; Schauer, J.; Spence, J.

I dissent. (Opinion filed.)

Gibson, C. J.

I concur.

Edmonds, J.

Nov. 14, 1945. Filed Respondent's petition for rehearing.

Nov. 23, 1945. Filed Answer to petition for rehearing.

Nov. 29, 1945. Rehearing denied. (Gibson, C. J., and Edmonds, J., voting for rehearing.)

(Traynor, J., did not participate herein.)

Dec. 3, 1945. Remittitur issued.

[fol. 113] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OPINION—December 30, 1944

GIBSON, Chief Justice:

This is an appeal from a judgment for plaintiff in an action to recover, with interest, a sum paid under protest as a retail sales tax and as interest thereon.

Plaintiff is a foreign corporation authorized to do business in California and engaged in producing, refining and selling crude oil and crude oil products. On December 3, 1936, the New Zealand Government, acting through its official purchasing agency, the Stores Control Board, invited bids for the supply of fuel oil required by the New Zealand Division of the Royal Navy. The invitation provided that bids were to be for delivery "f. o. b. N. Z. Government tank steamer at any port beyond New Zealand specified by the tenderer." Plaintiff instructed its agent in New Zealand to submit a bid specifying that the price quoted was f. o. b. ship's rail of buyer's tanker at the Richfield Marine Terminal at Long Beach, California. Plaintiff's bid was accepted and a written contract for the sale of oil was entered into in New Zealand on February

4, 1937. The contract contained, among other, the following provisions: "(1). Price * * * Fob Los Angeles, payment in London. * * * (3). Delivery shall be given to the order of the Naval Secretary, Navy Office, Wellington, into N. Z. Naval tank steamer, R. F. A. 'Nucula' at Los Angeles, California. (7). The Richfield Oil Co. shall advance to the Master of the 'Nucula' at Los [fol. 114] Angeles a sum in dollars the equivalent of up to £300 to meet disbursements at port of loading * * *, such advance to be repaid when payment is made for the fuel oil. (8). Bills of lading and other customary shipping documents shall be handed to the Master of the 'Nucula' and the oil consigned to the Naval-Officer-In-Charge, Auckland, New Zealand."

On May 14, 1937, pursuant to the contract, plaintiff delivered the oil into the "Nucula" at Long Beach, California. The oil was processed at plaintiff's refinery at Watson and piped to its storage tanks at Long Beach, from which it was loaded aboard the vessel. Following such delivery, plaintiff handed to the master of the vessel customary shipping documents, including a bill of lading designating plaintiff as shipper and providing for delivery unto the Naval Officer in Charge at the Port of Auckland, New Zealand. Plaintiff also filed with the United States Collector of Customs a Shipper's Export Declaration, which reported the shipment by plaintiff from Long Beach, California to Auckland, New Zealand. Thereafter, the entire supply of oil was delivered to the New Zealand Division of the Royal Navy at Auckland, and payment therefor was made to plaintiff in London, England.

On September 25, 1940, defendant assessed a retail sales tax against plaintiff measured by gross receipts from the foregoing transaction. Plaintiff paid the tax with interest, [fol. 115] a total of $1,514.78, under protest on July 7, 1942. In September, it filed a claim for refund which was denied. The present action was then commenced.

The cause was submitted to the trial court on the pleadings and on stipulation of fact entered into by the parties. The trial court found, in addition to the facts heretofore recited that oil had never been produced in New Zealand in sufficient quantities to supply the needs of the New Zealand Division of the Royal Navy, that plaintiff had previously made a shipment of oil to New Zealand under identical circumstances, and that it had always been the

intent of the parties to the contract that the oil would be exported to New Zealand without interruption. The court concluded that plaintiff was entitled to a refund of the amount paid, together with interest thereon, and entered judgment accordingly. This appeal followed.

The California Sales Tax Law imposes a tax upon retailers, measured by gross receipts, "for the privilege of selling tangible personal property at retail," and authorizes retailers to collect the tax from the consumers. (Revenue and Taxation Code, §§6051, 6052.) A sale is defined therein as "any transfer of title or possession * * * in any manner or by any means whatsoever, of tangible personal property * * *." (§6006.) By express provision of the law, gross receipts from sales of property which the state is prohibited from taxing under the Constitution of [fol. 116] the United States are exempt from computation of the amount of tax imposed. (§§6351, 6352.)

The sale or taxable event in the present case occurred when the fuel oil was loaded aboard the tanker "Nucula" at Long Beach, California, it being conceded that title to the oil passed to the New Zealand Government at that time. In support of the judgment, however, plaintiff contends that gross receipts from the sale were not subject to taxation under the law by reason of the prohibition of the federal Constitution that "No State shall * * * lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's (its) Inspection Laws." (Art. I, §10, cl. 2.) Defendant contends, on the other hand, that the sale of oil preceded its exportation and consequently was a local transaction subject to state taxation. It further contends that even if the oil attained the status of an export prior to the sale, the "export-import" clause of the Constitution does not prohibit the imposition of a sales tax based on that transaction.

It is admittedly difficult to ascertain the precise point at which the products of a state which are exported to foreign countries cease to be a part of the general mass of property of that state, subject to nondiscriminatory taxation as such, and become "exports" entitled to the constitutional protection against the imposition of taxes or duties. Clearly, [fol. 117] goods not intended for export when a general tax is laid on all property alike, are not exempt therefrom because they happen to be exported afterwards. (Brown v. Houston, 114 U. S. 622, 5 S. Ct. 1091, 29 L. Ed. 257.) And,

goods are not exempt from such taxation merely because they are intended for exportation or manufactured under a contract for export. (Turpin v. Burgess, 117 U. S. 504, 6 S. Ct. 835, 29 L. Ed. 988; Cornell v. Coyne, 192 U. S. 418, 24 S. Ct. 383, 48 L. Ed. 504.) On the other hand, goods in the actual course of transportation to a foreign destination and goods delivered to a common carrier for that purpose are in the process of exportation and constitutionally cannot be taxed. (Spalding & Bros. v. Edwards, 262 U. S. 66, 43 S. Ct. 485, 67 L. Ed. 865; see Pock & Co. v. Lowe, 247 U. S. 165, 175, 38 S. Ct. 432, 62 L. Ed. 1049; Turpin v. Burgess, supra, 117 U. S. at page 506, 6 S. Ct. 835, 29 L. Ed. 988; Coe v. Errol, 116 U. S. 517, 527, 6 S. Ct. 475, 478, 29 L. Ed. 715.) It was said in Coe v. Errol, supra, that goods exported to a foreign country do not cease to be part of the common property of the state of their origin for tax purposes until they "have been shipped or entered with a common carrier for transportation * * * or have been started upon such transportation in a continuous route or journey." (Cf. Railroad Commission v. Texas & P. R. Co., 229 U. S. 336, 33 S. Ct. 837, 57 L. Ed. 1215; Texas & N. O. R. [fol. 118] Co. v. Sabine Tram Co., 227 U. S. 111, 33 S. Ct. 229, 57 L. Ed. 442; Southern P. Terminal Co. v. Interstate Commerce Comm., 219 U. S. 498, 31 S. Ct. 279, 55 L. Ed. 310.)

Applying these general principles or formulas to the facts of the present case, we are of the opinion that the sale of oil was a step in its exportation and that the tax in question was improperly levied. The case of A. G. Spalding & Bros. v. Edwards, supra, is substantially on all fours with the present case and the decision of the United States Supreme Court therein is, of course, controlling. In that case, Delgado & Compania, a Venezuelan firm, requested New York commission merchants to buy certain sporting goods for their account. The commission merchants ordered the goods from the plaintiff, instructing it to deliver the same to a specified exporting carrier in New York addressed to Delgado & Compania. The plaintiff delivered the goods as directed and received a receipt from the carrier which it sent to the commission merchants, who exchanged it for a bill of lading in their own name. The commission merchants paid plaintiff and in due time the goods were transported and delivered to Delgado & Compania in Venezuela. In holding that a tax based on that sale could

not constitutionally be imposed upon plaintiff, the court stated, 262 U. S. at page 69, 43 S. Ct. at page 486, 67 L. Ed. 865, in language equally applicable to the case at bar, "The [fol. 119] very act that passed the title, and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port."

It is true that the Spalding case involved section 9, clause 5 of the Constitution, which prohibits Congress from laying taxes on articles exported from any state, rather than section 10, clause 2, but it has been repeatedly said that the prohibitions of those sections are identical. (Turpin v. Burgess, 117 U. S. 504, 506, 6 S. Ct. 835, 29 L. Ed. 988; Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678, 687.) Defendant seeks to distinguish the case, however, on the ground that while delivery therein was to a common carrier, delivery in the present case was to the purchaser's carrier. The distinction is one of form rather than substance. Delivery of goods to a common carrier for transportation is regarded as the beginning of the export journey because the destination of the goods is thereby fixed and certain. (Cf. Turpin v. Burgess, supra, 117 U. S. at page 507, 6 S. Ct. 835, 29 L. Ed. 988; Superior Oil Co. v. Mississippi, 280 U. S. 390, 396, 50 S. Ct. 169, 74 L. Ed. 504; Coe v. Errol, 116 U. S. 517, 527, 6 S. Ct. 475, 29 L. Ed. 715.) [fol. 120] But delivery of the oil to the "Nucula" in this case as effectively fixed its destination as did the delivery of the Goods to the common carrier in the Spalding case. Here, as there, title passed upon delivery, and the passage of title enables the purchaser to change the destination of the goods and thereby evade the tax. But, as stated in A. G. Spalding & Bros. v. Edwards, supra, 262 U. S. at page 70, 43 S. Ct. at page 486, 67 L. Ed. 865, "There was not the slightest probability of any such change and it did not occur," and "theoretical possibilities may be left out of account."

The law is not concerned with the means of shipment except to inquire whether the means chosen reasonably guarantees continuity of the export journey and foreign delivery in good faith. The means selected in this case, in the light of all the circumstances, satisfies that inquiry. The transaction in issue featured a contract negotiated and

entered into in New Zealand for the sale of fuel oil to supply foreign needs. Under that contract plaintiff was obligated to deliver the oil to the order of "Naval Secretary, Navy Office, Wellington" into the tanker "Nucula" at Long Beach, furnish the master of the tanker with customary shipping documents, including a bill of lading consigning the oil to the "Naval-Officer-In-Charge, Auckland, New Zealand," and advance a sum equal to £300 to the master [fol. 121] to meet disbursements at the port of loading. Plaintiff performed the obligations of its contract. It also executed an export declaration, and, as provided in the contract, received payment for the oil in London, England. From the inception of negotiations the parties contemplated an exportation of oil, and the oil was in fact exported to New Zealand. The only local phase of the sale was the delivery to the carrier in this state, and that delivery was the first step in the exportation. As stated in A. G. Spalding & Bros. v. Edwards, supra, 262 U. S. at page 70, 43 S. Ct. at page 486, 67 L. Ed. 865, "To put it at any later point would fail to give to exports the liberal protection that hitherto they have received."

The present case is even stronger than the Spalding case, for whereas here, the alleged local transaction was a direct sale to the foreign consumer and the oil was actually loaded aboard the carrier, the sale in the Spalding case was to an intermediary and the goods were merely delivered to the carrier.

Defendant argues that unless the Spalding case is distinguished or overruled an anomalous situation will exist in that the sale in the present case would have been taxable had the oil been intended for and transported in interstate commerce. It cites Department of Treasury v. Wood Preserving Corp., 313 U. S. 62, 61 S. Ct. 885, 85 L. Ed. 1188; Superior Oil Co. v. Mississippi, 280 U. S. [fol. 122] 390, 50 S. Ct. 169, 74 L. Ed. 504; and Standard Oil Co. v. Johnson, 56 Cal. App. 2d 411, 132 P. 2d 910, in support of the constitutionality of such a tax under the commerce clause. While a few cases have suggested that the prohibitions of the commerce and export-import clauses of the Constitution are substantially identical insofar as taxation is concerned (Crew-Levick Co. v. Pennsylvania, 245 U. S. 292, 295, 38 S. Ct. 126, 62 L. Ed. 295; Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678), other cases have rejected even an analogy between the two. (Sonneborn

Bros. v. Cureton, 262 U. S. 505, 43 S. Ct. 643, 67 L. Ed. 1095 (refusing to apply original package doctrine to sales of articles transported in interstate commerce); Woodruff v. Parham, 8 Wall. 123, 19 L. Ed. 382; cf. Fairbank v. United States, 181 U. S. 283, 306, 21 S. Ct. 648, 45 L. Ed. 862.) And, in two of the three cases involving the commerce clause cited by defendant, the Spalding case was expressly distinguished on the ground that it involved the export-import clause of the Constitution. (Superior Oil Co. v. Mississippi, supra; Standard Oil Co. v. Johnson, supra.) The distinction thus drawn between cases involving exports and cases dealing with interstate commerce is not without basis. Section 10, clause 2 in terms prohibits state taxation of exports, while section 8, clause 3 merely commits the regulation of commerce to the federal government. Modern [fol. 123] authorities recognize that those engaged in interstate commerce must pay their just share of state tax burdens, and that a state tax infringes the authority of Congress over interstate commerce only when it discriminates against or directly burdens such commerce. (McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876.) Defendant itself asserts that under the commerce clause "The question of where interstate or foreign commerce begins is wholly separate and apart from the question of what events occurring within a state are taxable."

Defendant advances two arguments in support of the contention that the tax imposed in the present case, although based upon gross receipts from the sale of oil in the process of exportation, does not violate article I, section 10, clause 2 of the Constitution: First, the tax is one imposed on retailers for the privilege of selling and is not an "impost" or "duty" on exports within the meaning of the constitutional prohibition. Second, the constitutional prohibition against state taxation of exports does not apply to exports orginating in the taxing state. In our opinion, neither argument is sound.

In the early case of Brown v. Maryland, 12 Wheat. 419, 444, 6 L. Ed. 678, 687, where the state argued that a license tax on importers did not contravene article I, section 10, clause 2 since it was a tax on the person rather than the [fol. 124] article, the Supreme Court said: "It is impossible, to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibi-

tion which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that, a tax on the sale of an article * * * is a tax on the article itself. * * * So, a tax on the occupation of an importer is * * * a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made." By way of dictum the court announced that a license tax on exporters would likewise contravene the prohibitions of the Constitution. And in the more recent case of Crew-Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295, it was expressly held that a state license tax on wholesale venders of merchandise, measured by gross receipts, is in effect an impost on exports when applied to merchandise sold and shipped to customers in foreign countries. (Cf. United States v. Hvoslef, 237 U. S. 1, 35 S. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286; Fairbank v. United States, 181 U. S. 283, 21 S. Ct. 648, 45 L. Ed. 862.)

The case of Crew-Levick Co. v. Pennsylvania, supra, is also authority for the proposition that the constitutional protection of exports is not limited to exports originating [fol. 125] outside the taxing state. There, the State of Pennsylvania unsuccessfully sought to tax exports originating in that state. While it may be conceded that article I, section 10, clause 2 was conceived in the desire to prevent the seaboard states from exacting tribute from their sister states (see Cook v. Pennsylvania, 97 U. S. 566, 574, 24 L. Ed. 1015; Woodruff v. Parham, 8 Wall. 123, 134, 135, 75 U. S. 123, 134, 135, 19 L. Ed. 382), the prohibition is general in its terms. As stated in Blount v. Monroe, 60 Ga. 61, 67, "The constitution does not prescribe that no state shall levy such a tax on exports of articles brought from other states to her seaport towns, but simply and without exception, it lays the ban of prohibition upon all exports."

The judgment is affirmed.

Shenk, Curtis, Edmonds, and Schauer, J. J., concurred.

Traynor, J., did not participate therein.

DISSENTING OPINION

CARTER, Justice (dissenting):

I dissent. In arriving at the conclusion that the plaintiff is exempt from the payment of sales tax upon the transaction in controversy, the majority of this court has ignored the more recent cases decided by the United States Supreme Court, and has based its decision upon what may be termed the old approach as applied to interestate and foreign commerce. Under that approach a state is entirely in-
[fol. 126] hibited from coming into contact with that commerce through its taxing power. On the other hand, cases decided by the United States Supreme Court since 1937 signify a new approach, whereby complete immunity from various state taxes which resulted from the earlier doctrine has been repudiated. (See Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944; J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429; Gwin, White & Prince, Inc., v. Henneford, 305 U. S. 434, 59 S. Ct. 325, 83 L. Ed. 272; McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876; Wisconsin v. J. C. Penney Co., 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267, 130 A. L. R. 1229; Department of Treasury v. Wood Preserving Corp., 313 U. S. 62, 61 S. Ct. 885, 85 L. Ed. 1188.) The essence of these decisions is recognition that not all state taxation is to be condemned because, in some manner, it has an effect upon interstate commerce, and recognition that there may be local activities by a taxpayer within a state, which may be sufficient to support a tax indepent of the character of the transaction as a whole, and though the tax may have some incidental effect on other than the purely local or intrastate aspects of that commerce.

[fol. 127] In McGoldrick v. Berwind-White Coal Min. Co., supra, a New York City tax upon the sale of goods for consumption was upheld as applied to a Pennsylvania corporation engaged in the production of coal in Pennsylvania and delivered by it to customers in New York. The tax was held to be conditioned upon events occurring within the state—delivery or the transfer of title or possession. It was said that not all state taxation is to be condemned because, in some manner, it has an effect upon commerce, and it is only when the tax operates to regulate commerce

between the states or foreign nations to an extent that infringes the authority of Congress that the tax can be said to exceed constitutional limitations.

In Wisconsin v. J. C. Penney Co., 311 U. S. 435, 61 S. Ct. 246, 250, 85 L. Ed. 267, 130 A. L. R. 1229, a tax on a foreign corporation's privilege of doing business was sustained. Liability was not imposed until the declaration of dividends payable to out-of-state stockholders. The court stated that, "The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is [fol. 128] contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction."

In Department of Treasury v. Wood Preserving Corp., 313 U. S. 62, 61 S. Ct. 885, 85 L. Ed. 1188, the Indiana Gross Income Tax Act of 1933, c. 50, was upheld as applied to a foreign corporation engaged in the business of purchasing railroad ties and selling them to purchasers with whom it had a contract for treating the ties by creosoting them. As to the dealings in question it appeared that the taxpayer purchased and received the ties from local producers in Indiana and sold them to the Baltimore & Ohio Railroad Company, making delivery f. o. b. cars on the railroad tracks in Indiana, pursuant to contract. The ties were then forthwith transported to Ohio for treatment. It was held that the tax was predicated upon local transactions which were none the less intrastate because the ties were intended for interstate shipment. It was pointed out that the taxpayer did not pay the freight for the transportation and that there was a completed delivery to the railroad company in Indiana. J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429, which arose under the same taxing act of Indiana, was distinguished. There the tax was laid upon receipts from sales where delivery was made to customers in other states and abroad.

[fol. 129] The California sales tax here under discussion has been held applicable to a sale of petroleum products

within the state to purchasers intending to transport the products out of state. Standard Oil Co. v. Johnson, 56 Cal. App. 2d 411, 132 P. 2d 910. In that case delivery of some of the items was made f. o. b. the purchasers tank cars. See, also, O'Kane v. State, 283 N. Y. 439, 28 N. E. 2d 905, and Trotwood Trailers v. Evatt, 142 Ohio St. 197, 51 N. E. 2d 645, upholding the validity of similar taxes, based upon local transactions prior to interstate transportation.

While all of the foregoing cases involved interstate commerce, and no case has arisen wholly concerned with foreign commerce since the advent of the modern view, yet those cases are authority in the field of foreign commerce, for the destination has no effect on the character of acts completed in a state. Otherwise the anomalous situation exists, that an act which is local if done where goods are intended for interstate commerce, is not local if done where goods are intended for foreign commerce, and California must accord a discriminatory favor to purchasers of commodities which go to a foreign country instead of a sister state or intrastate. If the imposition of a nondiscriminatory tax upon the privilege of selling, such as is the California sales tax, conditioned upon a sale and the passing of title by delivery [fol. 130] within the borders of the state is not a regulation of commerce, nor a burden thereon, forbidden by article I, section 8, clause 3 of the federal Constitution, then it must follow as a matter of course that it is not an "impost" or "duty" on exports within the meaning of article I, section 10, clause 2 of that Constitution. It is to be noted that we do not have before us any form of direct tax on goods intended for export, or on the privilege of exporting, and the tax is not measured in terms of export or import. The California Retail Sales Tax is a general excise tax on the privilege of selling, a distinctly local activity, as distinguished from a personal property tax or a tax on the sale or because of the sale. Western Lithograph Co. v. State Board of Equalization, 11 Cal. 2d 156, 78 P. 2d 731, 117 A. L. R. 838; Roth Drug, Inc., v. Johnson, 13 Cal. App. 2d 720, 57 P. 2d 1022. To export is to send merchandise from one country to a foreign country. Exportation is the act of sending or carrying merchandise from one country to another. (1 Bouv. Law Dict., Rawle's Third Revision, p. 1161; Black, Law Dictionary.) An export tax falls upon the one who takes the goods out of the country. Krauter

v. Menchacatorre, 202 App. Div. 200, 195 N. Y. S. 361. In Brown v. Houston, 114 U. S. 622, 5 S. Ct. 1091, 1095, 29 L. Ed. 257, the court said, "A duty on exports must either be a duty levied on goods as a condition, or by reason of [fol. 131] their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine." The California Retail Sales Tax is neither of these. The act of exportation in the case at bar is an immaterial consequence, subsequent to the occurrence of the taxable event, to wit: the transference of title and possession by delivery within the borders of this state. The mere fact that the goods were delivered on board a ship instead of inland to the purchaser does not transmute the fundamental nature of the tax. Furthermore, constitutional history discloses that the primary intent and purpose of article I, section 10, clause 2, was to prevent the seaboard states from benefiting, because of their location, at the expense and to the detriment of the remainder of the states. This much the majority opinion concedes. It was not intended to prevent the imposition of general taxes upon local privileges merely because goods were to be exported. Woodruff v. Parham, 8 Wall. 123, 134, 19 L. Ed. 382; The Federalist, No. 42; Story, Constitution, p. 714 (4th ed.); Warren, Making of the Constitution, p. 557. However, as pointed out in the majority opinion, the prohibition not being limited in terms has been applied to exports originating in the seaboard states. Crew-Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295. But the [fol. 132] attitude of the United States Supreme Court, now recognizing the definitely local attributes of transactions also having foreign consequences, and the right of the states to deal therewith, makes possible more nearly the attainment of the original purposes of the constitutional provision, by preserving the right of the states to impose general taxes not aimed at foreign commerce, even though a state may still be prohibited from directly levying upon its own exports by virtue of the broad terms of the clause.

The majority opinion in reaching a contrary result relies principally upon the case of A. G. Spalding & Bros. v. Edwards, 262 U. S. 66, 43 S. Ct. 485, 67 L. Ed. 865. That case decided back in 1923 is distinguishable in a number of its aspects from the case at bar. The tax was not conditioned upon any local activity of the taxpayer or the

consummation of any transaction within a state. It was not imposed by a state government but by the federal government itself, and was an excise tax upon the goods themselves. It was vitiated under article I, section 9, clause 5 of the Constitution. Further, delivery of the merchandise was made by the taxpayer to a common carrier which in turn transported the goods to the purchaser in a foreign port. In the case at bar the purchaser came to this country, received the goods and was thereafter free to take them wherever it chose.

[fol. 133] In rejecting appellant's contention that the tax imposed in the case at bar is one imposed on retailers for the privilege of selling, and is not an "impost" or "duty" on exports within the meaning of the constitutional prohibition, the majority opinion cites Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678, and Crew-Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295, both of which dealt with license taxes upon importers. In the former case the tax in the form of a license actually and potentially discriminated against domestic products or dealers therein, and in the latter case the tax was measured by gross receipts from sales and not conditioned upon the exercise of the taxpayer's franchise or any other local privilege. Cf. J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 310, 312, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429; McGoldrick v. Berwind-White Coal Min. Co., supra, 309 U. S. at pages 57, 58, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876. A $3.00 imposition upon wholesale vendors doing business within the state in both internal and foreign commerce was not questioned. It was similarly urged in McGoldrick v. Berwind-White Coal Min. Co., supra, that the conclusion there reached was inconsistent with the line of decisions following Robbins v. Taxing Dist. of Shelby County, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, which have held invalid license taxes to the extent that they have sought to tax the occupation of soliciting orders for the [fol. 134] purchase of goods to be shipped into the taxing state. It was noted that in some instances these taxes were aimed at suppression or placing at a disadvantage interstate business in favor of intrastate sales and otherwise these cases were tacitly disapproved, the court deeming it sufficient to say that the rule of Robbins v. Taxing District of Shelby County, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, had been narrowly limited to fixed-sum license taxes im-

posed on the business of soliciting orders for the purchase of goods to be shipped interstate and that the effect on commerce of such a tax was wholly wanting in the present case.

It follows from the foregoing considerations that I cannot agree with my associates in holding that the California Retail Sales Tax on the privilege of selling, which is accomplished within the state, and is nondiscriminatory in its elements, in an "impost" or "duty" within the purview of article I, section 10, clause 2, of the Constitution. Included in such a tax is no evil which the framers of the Constitution could be supposed to have intended to prevent. They were concerned with taxes which might be imposed because of the foreign character of the goods or resulting in the exaction of tribute because of that character. Woodruff v. Parham, supra; Cook v. Pennsylvania, 97 U. S. 566, 574, 24 [fol. 135] L. Ed. 1015. To otherwise hold is to disregard the underlying concept of the late cases reviewed herein, recognizing that transactions completed wholly within a state may be so related to privileges which the state is authorized to grant or deny as to warrant sustaining of their existence solely because of such relationship.

To my mind, it is perfectly absurd to say that the framers of the Constitution of the United States ever contemplated the proscription of such a tax, and it requires a most conservative and strained interpretation of its provisions to arrive at the conclusion reached in the majority opinion.

Simply stated, we have a situation where a product—"oil"—was produced, refined and stored, and finally sold and delivered by plaintiff to a purchaser in California. The plaintiff as such producer has enjoyed the privilege of doing business in California, the protection of its laws, and the service of its governmental agencies. It now seeks to evade the payment of a purely nondiscriminatory excise tax on the privilege of selling its products, under the specious argument that because it is selling such products to a foreign government for foreign consumption, such tax amounts to an impost or duty on exports and is invalid as being a contravention of article I, section 10, clause 2, of the Constitution of the United States. I say without fear of refutation that no court in this country has ever held [fol. 136] such a tax invalid under the factual situation here related. It is the modern concept that the tax burden

should be distributed in accordance with the benefits received and the ability of the taxpayer to pay, but under the majority decision in this case the plaintiff is escaping its fair share of the tax burden of this state, which means the shifting of its share of such burden to other taxpayers. Furthermore, the effect of this decision will be to permit the oil companies of this state to recover from the state all of the sales taxes which they paid on the huge quantities of oil sold by them to Japan prior to Pearl Harbor, if they have protected their right to such recovery, as I presume they have. Such recovery will no doubt amount to millions of dollars and will have a serious effect upon the revenues of the state. It seems clear to me that such a result should not be reached in the absence of a clear and positive constitutional mandate which is not present in this case.

In my opinion, the judgment should be reversed.

[fol. 137] IN THE SUPREME COURT OF CALIFORNIA, IN BANK

[Title omitted]

ORDER GRANTING REHEARING—Filed January 29, 1945

Appellant's petition for rehearing Granted.

Dated Jan. 29, 1945.

Shenk, Justice; Carter, Justice; Schauer, Justice and Spence, Justice.

[File endorsement omitted.]

[fol. 138] IN SUPREME COURT OF CALIFORNIA

OPINION—November 1, 1945

(Second and final decision)

CARTER, J.:

This is an appeal from a judgment for plaintiff in an action to recover retail sales tax paid under protest.

Plaintiff, a corporation, is engaged in producing and selling oil and oil products in California. The New Zealand

Government for use by its navy invited offers to sell oil to it for delivery "f.o.b. N. Z. Government tank steamer at any port beyond New Zealand specified by the tenderer." Plaintiff, in the course of its business, submitted an offer with the price quoted f.o.b. ship's rail of buyer's tanker at its storage terminal at Long Beach, California. Pursuant thereto a contract of sale was executed specifying that "(1) Price * * * f. o. b. Los Angeles, payment in London, * * * (3) Delivery shall be given to the order of the Naval Secretary, Navy Office, Wellington, *into* N. Z. *Naval tank steamer* R. F. A. 'Nucula' *at Los Angeles, California.* * * *

"(7) The Richfield Oil Co. shall advance to the Master of the 'Nucula' at Los Angeles a sum in dollars the equivalent of up to £300 to meet disbursements at port of loading on each trip, such advance to be repaid when payment is made for the fuel oil.

"(8) Bills of Lading and other customary shipping documents shall be handed to the Master of the 'Nucula' and the oil consigned to the Naval-Officer-In-Charge, Auckland, [fol. 139] New Zealand."

Pursuant to the contract plaintiff delivered oil from its storage tanks into the "Nucula" at Long Beach, California. Documents including a bill of lading naming plaintiff as shipper and stating that delivery would be made to the naval officer at Auckland, New Zealand, were delivered to the master of the vessel. Plaintiff also executed a shipper's export declaration, naming it as shipper. The oil reached New Zealand and was paid for in London. It is conceded that title to the oil passed to the buyer when plaintiff delivered it into the tanker at Long Beach, California.

The trial court found the following facts in addition to the foregoing: That oil had never been produced in New Zealand in sufficient quantities for that country's needs, and plaintiff had made other sales of oil to the buyer under similar circumstances; that the parties intended that the oil would be exported to the buyer without interruption.

Clearly, the sale here involved, falls within the provision of the California sales tax law. It levies a tax, measured by gross receipts, on retailers "for the privilege of selling tangible personal property at retail * * *." (Rev. & Tax. Code, §§ 6051, 6052.) The retailers are authorized

to collect the tax from the consumers. (Rev. & Tax. Code, §§ 6051, 6052.) A sale is "any transfer of title or posses-
[fol. 140] sion, * * * in any manner or by any means whatsoever, of tangible personal property for a consideration, * * *." (Rev. & Tax. Code, § 6006.) In the present case the transfer of possession and title took place in California.

In construing the above statutory provisions it has been definitely and squarely held by the courts of this state that:

"The tax being a direct obligation of the retailer and, so far as the consumer is concerned, a part of the price paid for the goods and nothing else, it is neither in fact nor in effect laid upon the consumer. It does not become a tax on the sale nor because of the sale, but remains an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales." (*Western L. Co.* v. *State Board of Equalization*, 11 Cal. 2d 156, 164 (78 P. 2d 731, 117 A. L. R. 838); see also *National Ice etc. Co.* v. *Pacific F. Exp. Co.*, 11 Cal. 2d 283 (79 P. 2d 380); *De Arjan* v. *Akers*, 12 Cal. 2d 781 (87 P. 2d 695); *Standard Oil Co.* v. *Johnson*, 10 Cal. 2d 758 (76 P. 2d 1184); *Roth Drug Inc.* v. *Johnson*, 13 Cal. App. 2d 720 (57 P. 2d 1022).)

Plaintiff invokes the Constitution of the United States as a bar to the collection of the tax. "The Congress shall have power * * * To regulate Commerce with foreign Nations, and among the several States * * *," (U. S. Const., [fol. 141] art. I, § 8, cl. 3). "No Tax or Duty shall be laid on Articles exported from any State." (U. S. Const., art. I, § 9, cl. 5.) "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such laws shall be subject to the Revision and Control of the Congress." (U. S. Const., art. I, § 10, cl. 2.)

It should be clear that the sales tax imposed in the instant case does not violate the United States Constitution. There is no discrimination penalizing the sale of goods that are exported to the advantage of sales in local or intrastate transactions. The tax falls equally on all transactions without distinction. The tax is not on export business as

such nor on the articles in export. Thus, the only theory upon which it may be said that the tax cannot be applied here is, that the property had already been launched upon its export journey when the sale was consummated and the tax attached to the sale, or, stated another way, the sale was an inseparable part of the exportation and therefore could not be subject to the tax. But here the delivery of the oil which resulted in the passage of title, and the completion of the sale, and the taxable incident, occurred [fol. 142] prior to the commencement of the exportation. The delivery of the oil was to the buyer's vessel not a common carrier. The vessel was in California waters and was not bound for any destination until it started to move from the port. It became the property of the buyer before any movement in the channels of commerce occurred. If it had been delivered to a common carrier of export products a different result might be appropriate, for then it would have been placed in the hands of an instrumentality whose *sole purpose* is to export goods, thus indelibly characterterizing the process as a part of exportation. Suppose a citizen of Mexico entered this country and purchased a banjo in a store a mile from the border with the unequivocal intent to take it back to Mexico with him and he did so. Would it be doubted that the retailer would be required to pay a tax on the sale? Would the result be any different if the Mexican came by his automobile and either he or the retailer for him placed the banjo in the car? Nor would the conclusion be altered if he gave the retailer an affidavit that he was taking the banjo to Mexico.

When a general tax is levied on all property alike, goods not intended for export are not immune because they are later exported. (*Brown v. Houston*, 114 U. S. 622 (5 S. Ct. 1091, 29 L. Ed. 257).) Nor are goods exempt from such tax on the ground that they are intended for exportation or manufactured under a contract for export. (*Turpin v.* [fol. 143] *Burgess*, 117 U. S. 504 (6 S. Ct. 835, 29 L. Ed. 988); *Cornell v. Coyne*, 192 U. S. 418 (24 S. Ct. 383, 48 L. Ed. 504.) It has been said that goods exported to a foreign country do not lose their character as a part of the common mass of property in the state from which exported "until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey." (*Coe v. Errol*, 116 U. S. 517, 527 (6 S. Ct. 475, 29 L. Ed.

715).) And also that " 'Whenever a commodity has *begun to move* as an article of trade from one State to another, commerce in that commodity between the States has commenced.' " But *this movement does not begin until the articles have been shipped or started for transportation* from the one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain." (Emphasis added.) (*Coe v. Errol*, supra, 528.)

The cases of *A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66 (43 S. Ct. 485, 67 L. Ed. 865), and *Crew-Levick Co.* [fol. 144] *v. Pennsylvania*, 245 U. S. 292 (38 S. Ct. 126, 62 L. Ed. 295), do not compel a different result. In the Spalding case the property had commenced its journey by being committed to a common carrier, an instrumentality whose sole function is transportation in commerce. Hence, when it was delivered to the carrier the process of exportation had begun. In any event both the Spalding case and the Crew-Levick case must be considered as expressing narrow views with reference to the field of state taxation which have been superseded by the recent decisions of the United States Supreme Court. In that connection it should be noted that in the Crew-Levick case, the argument was based upon both the ban against state imposition of imposts on exports and the power over foreign commerce, yet the court treated the case as a proper one for applying the rules applicable to state taxes where interstate commerce is involved. The court stated: "The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, * * * is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms." (*Crew-Levick Co. v. Pennsylvania, supra*, [fol. 145] 295.). And after discussing authorities dealing

with interstate commerce, it is said: "Most of these cases related to interstate commerce, but there is no difference between this and foreign commerce, so far as the present question is concerned." (*Crew-Levick Co. v. Pennsylvania, supra,* 296; see also *Brown v. Maryland,* 12 Wheat. (U. S.) 419 (6 L. Ed. 678); but see *Sonneborn Bros. v. Cureton,* 262 U. S. 506 (43 S. Ct. 643. 67 L. Ed. 1095).)

The new approach to the problem of the collision between state taxation and interstate commerce has been developed in many authorities. (See *Western Live Stock v. Bureau of Revenue,* 303 U. S. 250 (58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944); *J. D. Adams Mfg. Co. v. Storen;* 304 U. S. 307 (58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429); *Gwin, White & Prince, Inc. v. Henneford,* 305 U. S. 434 (59 S. Ct. 325, 83 L. Ed. 272); *McGoldrick v. Berwind-White Coal Min. Co.,* 309 U. S. 33 (60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876); *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435 (61 S. Ct. 246, 85 L. Ed. 267, 130 A. L. R. 1229); *Department of Treasury v. Wood Preserving Corp.,* 313 U. S. 62 (61 S. Ct. 885, 85 L. Ed. 1188); *International Harvester Co. v. Dept. of Treasury,* 322 U. S. 340 (64 S. Ct. 1019, 1030, 88 L. Ed. 1313); *McLeod v. J. E. Dilworth Co.,* 322 U. S. 327, 349 (64 S. Ct. 1023, 1030, 88 L. Ed. 1304, 1319); *General Trading Co. v. Tax Com.,* 322 U. S. 335 (64 S. Ct. 1028, 88 L. Ed. 1309).) The essence of these [fol. 146] decisions is recognition that not all state taxation is to be condemned because, in some manner, it has an effect upon interstate commerce, and recognition that there may be local activities by a taxpayer within a state, which may be sufficient to support a tax independent of the character of the transaction as a whole, and though the tax may have some incidental effect on other than the purely local or intrastate aspects of that commerce. For illustration in *McGoldrick v. Berwind-White Min. Co., supra,* a New York City tax upon the sale of goods for consumption was upheld as applied where a Pennsylvania corporation engaged in the production of coal in Pennsylvania delivered it to its customers in New York. The tax was held to be conditioned upon events occurring within the state—delivery or the transfer of title or possession. It was said that not all state taxation is to be condemned because, in some manner, it has an effect upon commerce, and it is only when the tax operates to regulate commerce between the states to

an extent that infringes the authority of Congress that the tax can be said to exceed constitutional limitations.

In *Department of Treasury v. Wood Preserving Corp.*, 313 U. S. 62 (61 S. Ct. 885, 85 L. Ed. 1188), the Indiana Gross Income Tax Act of 1933 was upheld as applied to a foreign corporation engaged in the business of purchasing railroad ties and selling them to purchasers with whom it [fol. 147] had a contract for treating the ties by creosoting them. As to the dealings in question it appeared that the taxpayer purchased and received the ties from local producers in Indiana and sold them to the Baltimore & Ohio Railroad Company, making delivery f. o. b. cars on the railroad tracks in Indiana, pursuant to contract. The ties were then forthwith transported to Ohio for treatment. It was held that the tax was predicated upon local transactions, which were none the less intrastate because the ties were intended for interstate shipment. It was pointed out that the taxpayer did not pay the freight for the transportation and that there was a completed delivery to the railroad company in Indiana.

General Trading Co. v. Tax Com., supra, involved an Iowa use tax. A sale of property was made in Minnesota to Iowa customers, the contract of sale being completed in Minnesota and the goods delivered to a common carrier there for shipment to Iowa.

The case of *International Harvester Co. v. Dept. of Treasury, supra*, concerned an Indiana tax levied on gross receipts from sales, particularly dealing with "(1) sales by out-of-State branches to Indiana dealers and users, where delivery is taken at plants of the corporation in Indiana; (2) sales to out-of-State buyers who come to Indiana, take delivery there, and transport the goods to another State; (3) sales in Indiana to Indiana buyers, where [fol. 148] the goods are shipped from out-of-State points to the buyer." (322 U. S. 340.)

Under the foregoing authorities it is perfectly clear that had this been an interstate transaction it would have been subject to tax. It is inconceivable that the framers of the Constitution ever intended that the export-import clause should be used to discriminate against the states.

Reference is made to *Hooven & Allison Co. v. Evatt*,— U. S. — (65 S. Ct. 870, — L. Ed. —) where Ohio sought to tax property imported by the taxpayer from the Philippine Islands while it was still in its original package and was

held by the importer for manufacture. It was held not taxable but the court was particularly concerned with the original package doctrine and by applying it concluded that the importation had not ended. In the instant case the export had not begun and we have no question of the invocation of that doctrine. Moreover, it is difficult to ascertain the precise holding of that case inasmuch as the opinion written by Mr. Chief Justice Stone, held two things: (1) That the shipment from the Philippine Islands was an import because that territory was not a part of this country and hence the provision against imposts on imports applied, and; (2) That the property was not taxable under that provision. Justices Black, Douglas, Rutledge and Murphy [fol. 149] dissented on the second point. Although Mr. Justice Reed apparently joined in the judgment reversing the state court's conclusion of taxability, he dissents on the first issue and his reasoning is of the character generally found in discussions as to the validity of state taxes where interstate commerce is involved.

In the instant case the tax imposed was a uniform nondiscriminatory excise tax on the privilege of doing business in this state. The transactions which was the basis for the tax was the sale of oil which was produced, refined, stored and delivered to the purchaser in this state. The tax imposed was in no sense a tax on exports and became effective before the oil started on its export journey. For these reasons it is clear that the tax was not imposed in violation of any of the provisions of the Constitution of the United States, and is therefore valid.

The judgment is reversed.

Shenk, J., Schauer, J., Spence, J., and Peters, J., pro tem, concurred.

DISSENTING OPINION

Gibson, C. J.—I dissent.

Under the prevailing decisions of the United States Supreme Court the tax imposed in the present case is prohibited by the "import-export" clause of the Constitution of the United States which provides that "No State shall * * * lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its [fol. 150] inspection Laws * * *." (Art. I, § 10, cl. 2.)

Since the question is entirely one of federal law, we are bound by those decisions.

It is admittedly difficult to ascertain the precise point at which the products of a state which are exported to foreign countries cease to be a part of the general mass of property of that state, subject to nondiscriminatory taxation as such, and become "exports" entitled to the constitutional protection against the imposition of taxes or duties. Clearly, where a general tax is laid on all property alike, goods not then intended for export are not exempt because they happen to be exported afterwards. (Brown v. Houston, 114 U. S. 622 (5 S. Ct. 1091, 29 L. Ed. 257).) And, goods are not exempt from such taxation merely because they are intended for exportation or manufactured under a contract for export. (*Turpin v. Burgess*, 117 U. S. 504 (6 S. Ct. 835, 29 L. Ed. 988); *Cornell v. Coyne*, 192 U. S. [illegible] (24 S. Ct. 383, 48 L. Ed. 504).) On the other hand, goods [illegible] the actual course of transportation to a foreign d[illegible] goods delivered to a common carrier for tha[illegible] in the process of exportation and constitutionally [illegible] taxed. (*A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66 (43 S. Ct. 485, 67 L. Ed. 865); see *William E. Peck & Co. v. Lowe*, 247 U. S. 165, 175 (38 S. Ct. 432, 62 L. Ed. 1049); *Turpin v. Burgess, supra*, at p. 506; Coe v. Errol, 116 U. S. [fol. 151] 517, 527 (6 S. Ct. 475, 29 L. Ed. 715.) It was said in *Coe v. Errol*, supra, that goods exported to a foreign country do not cease to be part of the common property of the state of their origin for tax purposes until they "have been shipped or entered with a common carrier for transportation * * * or have been started upon such transportation in a continuous route or journey." (*Cf. Railroad Commission v. Texas & P. Ry. Co.*, 229 U. S. 336 (33 S. Ct. 837, 57 L. Ed. 1215); *Texas & N. O. R. R. Co. v. Sabine Tram. Co.*, 227 U. S. 111 (33 S. Ct. 229, 57 L. Ed. 442); *Southern P. Terminal Co. v. Interstate Commerce Com.*, 219 U. S. 498 (31 S. Ct. 279, 55 L. Ed. 310).)

Applying these general principles or formulas to the facts of the present case, it seems reasonably clear that the sale of the oil, under terms requiring delivery to the ship of a foreign government, at which time title passed, was a step in its exportation. The case of *A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66 (43 S. Ct. 485, 67 L. Ed. 865), is particularly pertinent here. In that case a Venezuelan firm requested New York commission merchants to buy certain

sporting goods for their account. The commission merchants ordered the goods from plaintiff Spalding, instructing it to deliver the same to a specified exporting carrier in New York addressed to the Venezuelan firm. The plaintiff delivered the goods as directed and received a receipt from [fol. 152] the carrier which it sent to the commission merchants, who exchanged it for a bill of lading in their own name. The commission merchants paid plaintiff and in due time the goods were transported and delivered to the firm in Venezuela. In holding that a tax based on that sale could not constitutionally be imposed upon plaintiff, the court stated, at page 69, in language equally applicable to the case at bar, "The very act that passed the title, and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export, and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port."

It is true that the Spalding case involved section 9, clause 5, of the Constitution, which prohibits Congress from laying taxes on articles exported from any state, rather than section 10, clause 2, but it has been repeatedly said that the prohibitions of those sections are identical. (*Turpin v. Burgess*, 117 U. S. 504, 506 (6 S. Ct. 835, 29 L. Ed. 988); *Brown v. Maryland*, 12 Wheat. (U. S.) 419 (6 L. Ed. 678).) An effort is made to distinguish that case on the ground that the delivery there involved was to a common carrier, while the delivery in the present case was to the purchaser's carrier. This distinction is one of form rather than sub- [fol. 153] stance. Delivery of goods to a common carrier for transportation is regarded as the beginning of the export journey because the destination of the goods is thereby fixed and certain. (*Cf. Turpin v. Burgess, supra*, at p. 507; *Superior Oil Co. v. Mississippi*, 280 U. S. 390, 396 (50 S. Ct. 169, 74 L. Ed. 504); *Coe v. Errol*, 116 U. S. 517, 527 (6 S. Ct. 475, 29 L. Ed. 715).) But delivery of the oil to the "Nucula" in this case as effectively fixed its destination as did the delivery of the goods to the common carrier in the Spalding case. Here, as there, title passed upon delivery, and the passage of title enables the purchaser to change the destination of goods and thereby evade the tax. But, as stated in the Spalding case "There was not the slightest probability of any such change and it did not occur," and "theo-

retical possibilities may be left out of account." (262 U. S. at p. 70.) The law is not concerned with the means of shipment except to inquire whether the means chosen reasonably guarantees continuity of the export journey and foreign delivery in good faith. The means selected in this case, in light of all the circumstances, satisfies that inquiry. The only local phase of the sale was the delivery to the carrier in this state, and that delivery was the first step in the exportation. Under the Spalding case, to fix the step at which articles would be exempt from taxation "at any later point would fail to give the exports the liberal pro-[fol. 154] tection that hitherto they have received." (262 U. S. at p. 70.)

In some respects it would be more difficult to justify imposition of the tax in the present case than in the Spalding case because here the alleged local transaction was a direct sale to the foreign consumer and the oil was actually loaded aboard the carrier, whereas in the Spalding case the sale was to an intermediary and the goods were merely delivered to the carrier.

The contention that the constitutional prohibition against state taxation of exports does not apply to exports originating in taxing states is answered by the decision in *Crew-Levick Co. v. Pennsylavnia*, 245 U. S. 292 (38 S. Ct. 126, 62 L. Ed. 295), where the State of Pennsylvania unsuccessfully sought to tax exports originating in that state. While it may be conceded that article I, Section 10, clause 2, was conceived in the desire to prevent the seaboard states from exacting tribute from their sister states (see *Cook v. Pennsylvania*, 97 U. S. 566, 574 (24 L. Ed. 1015); *Woodruff v. Parham*, 8 Wall. (75 U. S.) 123, 134, 135 (19 L. Ed. 382)), the provision is general in its terms.

The prohibition of the federal Constitution, as interpreted by the United States Supreme Court, is not rendered inapplicable on the theory that the California statute levies the tax, not on the sales, but on the local business activities [fol. 155] of the seller, and that, therefore, the tax is not an "impost" or "duty" on exports. Although the formal subject of the tax is the "privilege of selling" (Cal. Rev. & Tax. Code, § 6051; see *Western L. Co. v. State Bd. of Equalization*, 11 Cal. 2d 156, 164 (78 P. 2d 731, 117 A. L. R. 838)), it is clear that the actual taxable event is the sale, or transfer of title or possession, and, in any event, the amount of the tax is expressly measured by gross receipts

from sales. (Rev. & Tax. Code, §§ 6006, 6007, 6051.) The United States Supreme Court has stated that in constitutional law cases the formal subject of a tax as declared by a state statute may be disregarded if the tax is in reality on something else, and it has held that taxes purporting to be on local business activities may be unconstitutional if they are in substance on interstate or foreign transactions. (See, for example, *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 439 (59 S. Ct. 325, 83 L. Ed. 272); *Crew-Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 294 (38 S. Ct. 126, 62 L. Ed. 295).) In the Crew-Levick case the court said (p. 294) that "we * * * are in duty bound to determine the questions raised under the Federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts." The court held that a Pennsylvania license tax of $3, together with "one-half mill additional on each dollar * * * of business transacted annually," [fol. 156] which in effect covered both local and foreign business, was unconstitutional because it "operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the State, a part of every dollar received in such transactions (exporting merchandise)." (245 U. S. at p. 297.) In like manner, the California sales tax, measured by gross receipts from sales, cannot be applied to export sales since it would withhold "a part of every dollar received in such transactions."

In the early case of *Brown* v. *Maryland*, 12 Wheat. (U. S.) 419 (6 L. Ed. 678), where the state argued that a license tax on imports did not contravene article I, section 10, clause 2, since it was a tax on the person rather than the article, the Supreme Court said (at p. 444): "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article * * * is a tax on the article itself. * * * So, a tax on the occupation of an importer is * * * a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made." By way of dictum the court announced that a license tax on exporters would likewise contravene the

[fol. 157] prohibitions of the Constitution. And, in the more recent case of *Crew-Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (38 S. Ct. 126, 62 L. Ed. 295), it was expressly held that a state license tax on wholesale vendors of merchandise, measured by gross receipts, is in effect an impost on exports when applied to merchandise sold and shipped to customers in foreign countries. (*Cf. United States* v. *Hvoslef*, 237 U. S. 1 (35 S. Ct. 459, 59 L. Ed. 813); *Fairbank* v. *United States*, 181 U. S. 283 (21 S. Ct. 648, 45 L. Ed. 865).) Thus, to the extent that the so-called privilege tax is measured by gross receipts from exports, under the existing decisions of the United States Supreme Court it amounts to a tax on exports and is improper.

It is apparent, however, that a new approach has been taken with respect to the problem of state taxation in the field of interstate commerce, and that there are various local activities by a taxpayer within a state sufficient to support a nondiscriminatory tax although the tax may have some incidental effect on interstate commerce. Thus if the present case involved the commerce clause rather than the import-export clause of the federal Constitution, it may be that the tax could properly be imposed, since it falls equally without discrimination, upon all sales in the state, whether the goods are destined for local use or for export. In *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62 (61 S. Ct. 885, 85 L. Ed. [fol. 158] 1188), for example, an Indiana gross receipts tax was upheld although the goods were sold to an out-of-state buyer and, similar to the situation in the Spalding case, were delivered to a *common carrier* in the taxing state for transportation out of the state. It is somewhat difficult to reconcile these cases upon any other basis than that one concerned foreign commerce and the other interstate commerce.

It does not follow, however, that the views expressed in the Spalding and Crew-Levick cases with respect to imports and exports have been superseded by the interstate commerce decisions. The cases relate to different clauses of the Constitution and involve both different language and different purposes and policies. While a few cases have suggested that the prohibitions of the commerce and import-export clauses of the Constitution are substantially identical insofar as taxation is concerned

(*Crew-Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 295 (38 S. Ct. 126, 62 L. Ed. 295); *Brown* v. *Maryland*, 12 Wheat. (U. S.) 419 (6 L. Ed. 678)), other cases have rejected even an analogy between the two. (*Sonneborn Bros.* v. *Cureton*, 262 U. S. 506 (43 S. Ct. 643, 67 L. Ed. 1095) (refusing to apply original package doctrine to sales of articles transported in interstate commerce); *Woodruff* v. *Parham*, 8 Wall. (75 U. S.) 123 (19 L. Ed. 382); cf. *Fairbank* v. *United States*, 181 U. S. 283, 306 (21 S. Ct. 648, 45 L. Ed. 862).)

[fol. 159] The latest decision of the United States Supreme Court involving state taxation of articles in foreign commerce expressly rejects the analogy of the interstate commerce cases. (*Hooven & Allison Co.* v. *Evatt*, —— U. S. —— (65 S. Ct. 870, 877, —— L. Ed. ——).) The state tax there held improper was a general, nondiscriminatory property tax. Although the United States Supreme Court thus had the opportunity to apply the reasoning of the interstate commerce cases, it did not do so, and, further, not even the dissenting opinion discussed the possibility of revising the older cases but, instead, relied upon a factual distinction. (See note (1945) 58 Harv. L. Rev. 858-876.) Until such time as that court determines to permit nondiscriminatory state taxation of sales made in foreign commerce, it would seem improper for a state court to give its approval to such a tax.

The judgment, therefore, should be affirmed.

Edmunds, J., concurred.

[fol. 160] IN THE SUPREME COURT OF CALIFORNIA,
SACRAMENTO

No. 5640

RICHFIELD OIL CORPORATION, a corporation, Plaintiff, Respondent

vs.

STATE BOARD OF EQUALIZATION, Defendant, Appellant

On Appeal from the Superior Court in and for the County of Sacramento.

JUDGMENT

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It is Ordered, Adjudged, and Decreed by the Court that the Judgment of the Superior Court in and for the County of Sacramento in the above entitled cause, be and the same is hereby reversed.

Appellant to recover costs on appeal.

I, A. V. Haskell, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 1st day of November, 1945, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 3rd day of December, A. D. 1945.

A. V. Haskell, Clerk, by L. F. White, Deputy. (Seal.)

[fol. 161] IN THE SUPREME COURT OF CALIFORNIA, IN BANK

[Title omitted]

ORDER DENYING REHEARING—Filed November 29, 1945

Respondent's petition for rehearing Denied.

Gibson, C. J., and Edmonds, J., voting for rehearing.

Dated Nov. 29, 1945.

Gibson, Chief Justice.

Traynor, J., did not participate herein.

[File endorsement omitted.]

[fol. 162] [File endorsement omitted.]

[fol. 163] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

Petition for Appeal, Assignments of Error, and Prayer for Reversal—Filed January 17, 1946

To the Honorable Phil S. Gibson, Chief Justice of the Supreme Court of the State of California:

Richfield Oil Corporation, a corporation, appellant and plaintiff in the above entitled cause, petitions and represents as follows:

The decision of the Supreme Court of the State of California in the above entitled cause was filed with the Clerk of said Court on November 1, 1945. On November 14, 1945, a petition for rehearing in said cause was duly presented and filed by appellant. On November 29, 1945, an order was made by the Supreme Court of the State of California in said cause denying said petition for rehearing.

[fol. 164] Considering itself aggrieved by the said final judgment of the Supreme Court of the State of California in the above entitled cause, said appellant, Richfield Oil Corporation, hereby prays that an appeal be allowed to the Supreme Court of the United States and for an order fixing the amount of bond.

ASSIGNMENTS OF ERROR

The said appellant, Richfield Oil Corporation, assigns the following errors in the record and proceedings in said cause:

(1) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in sustaining the validity of the California Retail Sales Tax Act of 1933, as amended, construed, applied and enforced to impose a tax upon the sale of fuel oil here involved, as against appellant's contention that said Act, so construed, applied and enforced, is invalid under Article I, section 10, clause 2, of the United States Constitution.

(2) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the California Retail Sales Tax Act of 1933, as amended, when construed and applied to impose a tax of 3% upon the sale of fuel oil to the New Zealand Government Stores Control Board for exportation to New Zealand, and which was so exported, is not invalid under and repugnant to the provisions of Article I, section 10, clause 2, [fol. 165] of the United States Constitution.

(3) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the tax levied upon and collected from appellant, Richfield Oil Corporation, pursuant to the California Retail Sales Tax Act of 1933, as amended, was not an impost or duty on exports in violation of or repugnant to or within the meaning of Article I, section 10, clause 2, of the United States Constitution.

(4) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that any event that, under Article I, section 10, clause 2 of the Constitution of the United States, may be taxed under the California Retail Sales Tax Act of 1933, as amended, occurred prior to the commencement of the exportation of the oil to New Zealand.

(5) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the delivery of the oil and the passage of title to the said oil to the purchaser occurred prior to the commencement of any exportation of said oil.

(6) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that no exportation of the oil commenced until the vessel "Nucula" started to New Zealand.

(7) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its deter- [fol. 166] mination that the transportation of the oil from appellant's refinery to its Marine Terminal, and the delivery of the oil from the storage tanks at the Marine Terminal to the vessel "Nucula," were not movements of the oil in exportation to New Zealand.

(8) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in failing to give consideration or effect to:

(a) The New Zealand Government Stores Control Board's invitation for tenders which stated that the oil was "required by the New Zealand Division of the Royal Navy * * * for delivery f. o. b. N. Z. Government tank steamer at any port beyond New Zealand specified by the tenderer."

(b) The provisions of the sales contract which, among other things, required the delivery to the Master of the vessel "Nucula" of bills of lading and other customary shipping documents consigning the oil to the Naval Officer-in-Charge, Auckland, New Zealand.

(c) The execution of the bill of lading consigning the oil to the Naval Officer-in-Charge at Auckland, New Zealand.

(d) The execution and filing of the export declaration.

[fol. 167] (e) The actual exportation of the oil to New Zealand pursuant to the contract, bill of lading, and export declaration.

(9) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the sale of oil was an intrastate sale instead of an export sale.

(10) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the power of the State to tax exports is coextensive with and subject to the same limitations as its power to tax interstate commerce sales or transactions.

(11) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the tax levied upon appellant was not invalid, illegal or unenforceable and was not contrary to, or in violation of, the provisions of Article I, section 10, clause 2, of the Constitution of the United States, because the said tax was non-discriminatory.

(12) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its deter-

mination that the provisions of the California Retail Sales Tax Act of 1933, as amended, construed and applied to impose a tax measured by the gross proceeds of the export sale of the oil here involved, could be sustained as an excise [fol. 168] or privilege tax on the privilege of performing in California acts which were part of, or steps in, the exportation of said oil.

(13) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the scope and effect of United States Constitution, Article I, section 10, clause 2 permits or requires different results as to the validity of a tax upon exports when (1) the goods are delivered for exportation to the purchaser's vessel, and (2) when the goods are delivered for exportation to a common carrier.

(14) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in reversing the judgment of the Superior Court of the State of California.

PRAYER FOR REVERSAL

For which errors, appellant, Richfield Oil Corporation, prays that the said judgment of the Supreme Court of the State of California, dated November 1, 1945, in the above entitled action be reversed and a judgment rendered in favor of the said appellant, and for costs.

Dated: January 17, 1946.

Robert E. Paradise, Norman S. Sterry, Counsel for Appellant. Lloyd & Paradise, Gibson, Dunn & Crutcher, Of Counsel.

[fol. 169] [File endorsement omitted.]

[fol. 170] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed January 17, 1946

Richfield Oil Corporation, a corporation, having prayed for an allowance of an appeal to the Supreme Court of the United States from the final judgment rendered by the Su-

preme Court of the State of California in the above entitled cause and having presented and filed its petition for appeal, assignment of errors and prayer for reversal, and a statement as to jurisdiction on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

It is now ordered that an appeal be and the same is hereby allowed in the above entitled cause as provided by law, from the Supreme Court of the State of California to the Supreme Court of the United States; and

[fol. 171] It is further ordered that the clerk of the Supreme Court of the State of California prepare and certify a transcript of the record in this cause, as may be designated by the appellant and appellee, and transmit the same to the Supreme Court of the United States so that the clerk of said Court shall have said record within sixty days from this date; and

It is further ordered that security for costs on appeal be fixed in the sum of $500.00, and that upon approval of bond in said amount all further proceedings in the above entitled cause shall be stayed until final determination of said appeal.

Dated: January 17, 1946.

Phil S. Gibson, Chief Justice of the Supreme Court of the State of California.

[fols. 172-174] Citation in usual form, filed Jan. 17, 1946, omitted in printing.

[fol. 175] Bond on Appeal for $500.00 omitted in printing.

[fol. 176] [File endorsement omitted.]

[fol. 177] IN THE SUPREME COURT OF THE UNITED STATES

PRAECIPE FOR TRANSCRIPT ON APPEAL TO SUPREME COURT OF UNITED STATES—Filed January 17, 1946

To the Supreme Court of the State of California and to the Clerk thereof:

On behalf of Richfield Oil Corporation, appellant, it is requested that you prepare and certify the transcript of record on appeal to the Supreme Court of the United States in the above entitled cause and the following are hereby designated to be included in said transcript:

1. Clerk's transcript on appeal as filed in Supreme Court of the State of California.

2. Proceedings in Supreme Court of the State of California.

3. Petition for allowance of appeal, assignments of error and prayer for reversal.

[fol. 178] 4. Statement of jurisdiction on appeal.

5. Order allowing appeal.

6. Bond on appeal.

7. Citation on appeal.

8. Praecipe for transcript on appeal.

9. Appellant's notice to appellee of appeal and statement directing appellee's attention to paragraph 3, rule 12, Rules of Supreme Court of the United States.

10. Proof of service on appellee of preceding documents designated as numbers 3 to 9 inclusive.

11. All statements and motions required and permitted to be filed under rule 12 of Rules of the United States Supreme Court.

Dated: January 17, 1946.

Robert E. Paradise, Norman S. Sterry, Attorneys for Appellant.

Lloyd & Paradise, Gibson, Dunn & Crutcher, of Counsel.

[fols. 179-180] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 181] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY, AND DESIGNATION OF RECORD—Filed February 25, 1946

In compliance with Paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, Appellant, Richfield Oil Corporation, hereby adopts each and every of its assignments of error as its statement of points intended to be relied upon by Appellant.

In further compliance with Paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, Appellant, Richfield Oil Corporation, thinks the entire record of the above entitled cause, as certified by the Clerk of the Supreme Court of California, is necessary for the consideration of the points upon which Appellant intends to rely; and accordingly Appellant, Richfield Oil Corporation, designates that the entire record, as certified by the Clerk of the Supreme Court of the State of California, shall be [fol. 182] printed by the Clerk of the Supreme Court of the United States.

Dated: February 15, 1946.

Norman S. Sterry, Counsel for Appellant.

Robert E. Paradise, Lloyd and Paradise, Gibson, Dunn & Crutcher, of Counsel.

[fol. 185] PROOF OF SERVICE OF PAPERS ON APPELLEE

Service is hereby acknoweldged on this 18th day of February, 1946, of the following in the above entitled cause:

Statement of Points on Which Appellant Intends to Rely, and Designation of Record.

Robert W. Kenny, Jr., Attorney General of the State of California, Attorney for Appellee.

John Noursc, Deputy Attorney General of the State of California, of Counsel.

[fol. 183a] [File endorsement omitted.]

[fol. 184] SUPREME COURT OF THE UNITED STATES

ORDER POSTPONING FURTHER CONSIDERATION OF QUESTION OF JURISDICTION TO HEARING ON MERITS—March 25, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits.

Mr. Justice Jackson took no part in the consideration of this question.

Endorsed on Cover: File No. 50,567. California, Supreme Court. Term No. 864. Richfield Oil Corporation, Appellant, vs. State Board of Equalization. Filed February 18, 1946. Term No. 864 O. T. 1945.